

166-147 1005

# Record No. 1610

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In the  
Supreme Court of Appeals of Virginia  
at Richmond

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**THE TRAVELERS INSURANCE COMPANY,**  
Plaintiff in Error,

v.

**JOLIFF S. BRINKLEY, Defendant in Error.**

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FROM THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

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“The briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records along with which they are to be bound, in accordance with Act of Assembly, approved March 1, 1903; and the clerks of this court are directed not to receive or file a brief not conforming in all respects to the aforementioned requirements.”

The foregoing is printed in small pica type for the information of counsel.

M. B. WATTS, Clerk.

166 Va 147

IN THE  
**Supreme Court of Appeals of Virginia**

AT RICHMOND.

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**Record No. 1610**

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**THE TRAVELERS INSURANCE COMPANY, Plaintiff in  
Error (Defendant Below),**

*versus*

**JOLIFF S. BRINKLEY, Defendant in Error (Plaintiff  
Below).**

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**PETITION FOR WRIT OF ERROR.**

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*To the Honorable Judges of the Supreme Court of Appeals  
of Virginia:*

Your petitioner, The Travelers Insurance Company, respectfully represents unto the Court that it is aggrieved by the final order entered by the Circuit Court of the City of Portsmouth, Virginia, on the sixth day of September, 1934, whereby it was adjudged that the plaintiff recover from the said defendant the sum of \$2,000.00, with interest and costs. A transcript of the record, duly certified by the clerk of the lower court, is filed herewith.

**1. STATEMENT OF FACTS.**

The Travelers Insurance Company is a foreign corporation carrying on the general business of writing insurance in the State of Virginia, and incident to that business had insured and issued to the Norfolk & Portsmouth Belt Line Railroad

Company a contract of group insurance under a policy numbered G-3669. In connection with such group insurance policy a certificate was issued to Joliff S. Brinkley, an employee of the Norfolk & Portsmouth Belt Line Railroad Company, on the 9th day of April, 1925, bearing serial number 35, and being in the principal sum of \$2,000.00.

On May 11, 1933, Brinkley sustained an accident and certain resulting injuries therefrom, on account of which claim was made by him upon the Insurance Company for total and permanent disability compensation. The Insurance Company, however, refused payment of compensation upon this claim, whereupon a notice of motion for judgment was filed on June 23, 1934, and the case tried before a Judge and jury.

The certificate of insurance issued by the Insurance Company to Brinkley is in two parts, being marked Part A and Part B, and being original exhibit No. 1 as filed with the record in this case. This claim is founded upon Part A, and the pertinent paragraph of that certificate is as follows:

“If any employee shall furnish the company with due proof that while insured under this policy and before having attained the age of sixty, he has become wholly disabled by bodily injuries or disease, and will be permanently, continuously and wholly prevented thereby for life from engaging in any occupation or employment for wage or profit, the company will waive further payment of premium as to such employee and pay in full settlement of all obligations to him under this policy the amount of insurance in force hereunder upon his life at the time of the receipt of due proofs of such disability either in one amount or in a fixed number of instalments chosen by him, the first instalment to be paid immediately upon receipt of due proofs of such disability.”

Plaintiff's contention in the court below was that his injuries were of such a nature and to such an extent that he was wholly disabled from following his usual occupation as brakeman with the Belt Line Railroad, and that, therefore, he is entitled to the benefits conferred by this certificate of insurance. See instruction 4-P given at the request of the plaintiff and found at page 57 of the record.

The Insurance Company on the other hand contends that the plaintiff is not wholly and permanently disabled and that in any event, the extent of his injuries do not bring him within the provisions of the certificate sued upon.

At the end of the evidence the defendant moved the court to strike the evidence, which motion was refused and exception noted. Objections and exceptions were then noted to in-

structions as given and refused, and after the verdict motion was made to set aside the verdict, which was also refused, and a proper exception noted.

### ASSIGNMENTS OF ERROR.

The petitioner assigns the following as errors:

1. The court erred in refusing to strike the evidence on motion of the defendant.
2. The court erred in granting instruction No. 4-P for the plaintiff.
3. The court erred in refusing to grant instruction 3-D on behalf of the defendant.
4. The court erred in refusing to set aside the verdict and to enter final judgment for the defendant or to grant a new trial.

### ARGUMENT.

*Brinkley was not Permanently and Totally Disabled as Contemplated by the Contract of Insurance.*

#### (a) The injuries.

In discussing this question, which is the real one in the case, it is necessary first to know just what the nature and extent of the injuries were as sustained by Brinkley. As to this there is no real dispute in the medical testimony. Brinkley had been an employee of the Belt Line Railroad for a number of years, and at the time of the injury was acting as conductor on the Railroad. He first started railroading in 1912 as a yard clerk (R., p. 13) and had held various positions during that experience. His first position was with the Atlantic Coast Line Railroad in the yard office. Following the injury to his hand, he was treated by Dr. Louis A. McAlpine, who was the physician for the Railroad, and whose description of the injury is found at page 35 of the record. Mr. Brinkley's left hand was injured so that the tendons became involved in scar tissue on the back of his hand "and those tendons naturally can't slide like they should, and it prevents him from gripping his fist tight". There were two fractures, one of the ring finger, left hand, and one of the index finger (R., pp. 30 and 31), but these fractures, according to Dr. McAlpine, did not contribute to his disability "because there is no apparent deformity there at all and because the fracture has healed, and

the hand doesn't close for the simple reason that the tendons don't permit it to". (R., p. 35.)

Mr. Brinkley also complained of pain in the back of his hand (R., p. 13). His physician, Dr. Brooks, stated that this pain was caused by the end of the nerve being caught in the scar tissue, which could be relieved by a slight operation (R., p. 32). Dr. Brooks and Dr. J. C. Dunford examined the injury on behalf of plaintiff and testified for him, and both stated that they thought that the disability of his left hand was 100% as far as his customary and usual work was concerned. (R., pp. 27 and 32.) Both of these doctors, however, admitted, on cross examination, that the disability to which they referred is limited entirely to the use of his left hand, and that there was nothing wrong whatever with any other portion of the man's body (R., pp. 28 and 33).

Dr. McAlpine was unable to state whether Mr. Brinkley could do work as a conductor or not (R., p. 36), but it was his opinion that Mr. Brinkley should make an attempt to see if he could perform his railroad work (R., p. 37), but for some reason Mr. Brinkley did not desire to do this (R., p. 37). Dr. McAlpine also pointed out that Mr. Brinkley could hold down any position involving clerical work (R., p. 40), and it needs no expert testimony for us to realize in the man's present condition of fitness that he is able to do any other kind of manual work that does not involve the tightly closing of his left hand.

Dr. Foy Vann, an orthopedic surgeon, saw the man when he was first injured and also again at his office, and had seen him at odd times during his treatment and knew about the injury to his left hand. He describes that there is a little motion, but not full motion in the finger joints. In the thumb there is no motion. In his opinion the fingers are eighty or ninety per cent disabled, although there is no injury to his left arm. Dr. Vann has had wide experience in connection with the treatment and rehabilitation of persons disabled in some portions of their bodies, and at pages 45 and 46 of the record he gives illustrations of people who have actually lost an arm or leg, and who have followed gainful occupations along a number of lines. Basing his answer upon his experience and from his observation of Mr. Brinkley, he makes this statement: "I would say he is not totally or permanently or continuously disabled from entering into some gainful occupation". (R., p. 46.)

To sum up the medical testimony, Mr. Brinkley has an injury to the back of his left hand which so affects the tendons in his left hand that he cannot close his hand, but that in every other respect he is perfectly normal.

Since this injury has happened, and as an illustration of his ability to handle himself, Mr. Brinkley admits that he owned an Essex automobile and drove it (R., p. 17). In addition, during that period he had a position with the local office of the American Legion. It is true that Mr. Brinkley attempts to minimize the service he rendered, but after all it is a fact that he substituted while the house manager was in the hospital and until a regular manager was appointed, and that during this time he received first a salary of \$10.00 a week for a while and afterwards \$15.00 a week (R., pp. 15-16.)

It also developed that he had applied to an automobile agency for a position (R., p. 19). He did not get the position, but we are certainly entitled to the inference that he would not have sought employment as an automobile salesman if he had not felt himself competent and able to fulfill the position.

It was also in evidence that he applied at the Belt Line for work (R., p. 21), and there is a conflict between the testimony of Mr. Brinkley and Mr. Williamson of the Belt Line as to just what that conversation was. It is true that he was not given a position. It is also true that Brinkley had instituted a suit against the Belt Line claiming damages in a large amount, and also that he did not get a job with the Belt Line. Here, too, we are certainly entitled to the inference that Brinkley would not have offered for a job unless he felt that he could hold it.

Nor are we dealing here with a man wholly unfitted with reference to the affairs of life. He was 36 years of age, had had considerable experience both as clerk in the yardmaster's office, brakeman and conductor, and, as can be seen by Exhibit A sent up with this record as an original, can write not only legibly, but with a steadiness and distinctness much above the average. Certainly it cannot be said with any sincerity that this man is *wholly* and permanently disabled.

#### (b) The Law.

At the very beginning we must bear in mind the contract under which this plaintiff is seeking to recover. The language of the clause in question is unambiguous and perfectly plain in its meaning. In order for the insured to recover under this particular type of insurance he must have become wholly disabled and "be permanently, continuously and wholly prevented thereby for life from engaging in *any* occupation or employment for wages or profit". There are many varied forms of insurance, and we are not at liberty in deciding in-

sured's right to substitute for the provision involved some other form of insurance providing some other kind of benefit or advantage. We are, of course, mindful that courts construe these insurance contracts in favor of the insured wherever any doubt arises, but where the language used is direct and simple, so that there can be no controversy as to its meaning, then the insured is not entitled to any advantage of construction.

Plaintiff's contention at the trial in the lower court was that this clause should be read to include therein a phrase to the effect that if the insured were disabled and prevented from following his usual vocation, which he was following at the time of the accident, he could recover the amount in the policy. In other words, even though Brinkley could perform any number of services or engage in many occupations or employments for wage or profit, he would still be entitled to recover the full face value of his policy if he could not perform the duties of a brakeman on a railroad. To give such an effect to the contract would be to insure the job and not the person. It means that we have to discard entirely the direct language of the contract and use instead an entirely different subject of insurance and limitation of recovery.

The Insurance Company, on the other hand, contended that the policy means just what it says and that the court has no right to place an entirely foreign construction upon the contract between the parties in order for the plaintiff to recover. It would certainly seem to be highly inequitable to allow a man like Mr. Brinkley to go about with a perfectly normal manner and be capable of performing various types of work and yet allow him to recover from an insurance company under such a construction as this.

At the trial of the case in the lower court plaintiff's counsel asked certain questions which were limited to the disability in connection with Brinkley's usual job on the railroad. Objections were taken to this evidence and exceptions noted, as will be seen at pages 12, 26 and 27 of the record. The instruction asked for by plaintiff and granted by the court is found at page 57 of the record, and there the contention of plaintiff was upheld by the court in the following language:

"The court instructs the jury that the language of the policy 'wholly disabled by bodily injury or disease, and will be permanently, continuously and wholly prevented thereby for life from engaging in any occupation for wage or profit', the vocation of the insured not being designated, should be construed as meaning the vocation or calling which the in-

sured might be following at the time he became disabled, and not any vocation whatever which he might be able to follow after he had been disabled, and if you believe from the evidence that the plaintiff will be permanently, continuously and wholly prevented from following his usual occupation, he is entitled to recover of the defendant the sum of \$2,000.00."

The same objections were noted to this instruction by defendant, and defendant also asked a counter instruction known as 3-D, found at page 61 of the record, which was refused. All of these objections to evidence, objections to instructions, motion to strike and motion to set aside the verdict revolve around this one legal question as to the construction of the contract sued upon.

A very recent case and one very much in point is that of *Metropolitan Life Insurance Company v. Foster*, decided by the Circuit Court of Appeals for the Fifth Circuit in October, 1933, and reported in 67 Fed. (2d), page 264. The language in question there was included in a certificate of insurance which provided that "any employee shall be considered as totally and permanently disabled who furnishes due proof that, as the result of bodily injury suffered or disease contracted while his insurance was in force and prior to his sixtieth birthday, he is permanently, continuously and wholly prevented thereby from performing any work for compensation or profit". (Page 265.) In that case the injured party was 38 years of age, and while working as a brakeman got his left arm crushed so that amputation at the shoulder resulted. First, with reference to the language of the contract itself, which is decidedly similar to the language of the contract now under consideration, the court says at page 265:

"The propriety of the charge depends upon the construction of the contract, which is to be found both in the main policy and the individual certificate issued to Foster, each referring to the other. The former describes the disability which will mature the insurance as that which prevents one from engaging in any occupation and performing any work for compensation or profit; while the certificate defines it as that which permanently, continuously, and wholly prevents one from performing any work for compensation or profit. The language of the contract, though formulated by the company, is to be taken in its usual and ordinary sense. *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 14 S. Ct. 379, 38 L. Ed. 231. The parties were free to contract for any risks they chose, adjusting the premium charge to the risks as-



sumed. *Hawkeye Commercial Men's Association v. Christy* (C. C. A.), 294 F. 208, 40 A. L. R. 46."

After commenting upon the construction to be given to the contract itself, the court then very pertinently remarks:

"We have no more right to enlarge the liability by artificial construction of the policy than to increase the penalty of a bond or raise the face of a promissory note."

We call the court's attention especially to the remainder of this opinion, as it is a very strong one, and argues with much force that the contract of the policy is not to be enlarged. As the court said, "there is no occasion to strain the words".

In this Foster case the man totally lost his left arm as distinguished from the mere loss of use of the left hand for certain purposes. On page 266 there is an interesting discussion as to the contention of plaintiff that the contract should be construed to cover only the man's regular occupation, and the comment upon the error of the lower court in restricting in his charge "the ability to work to the regular occupation of the insured as brakeman and to those occupations within his training and experience, all of which the insured testified required two hands". The court then proceeds to say:

"We think that, if he was able mentally and physically to hold a job as crossing watchman or crew caller, or in other lines than railroad work, and thereby to earn a substantial wage or profit, he was not totally disabled within the meaning of this policy, and the jury should have been so instructed. The evidence shows, and *it is common knowledge that a man with only one arm or leg, if not otherwise incapacitated, may do much valuable work and engage in many gainful occupations, and there are many cases so holding.*" (Italics ours.)

Another case even more recent than the Foster case is that of *Nason Sibley v. The Travelers Insurance Company*, decided by the appellate court of Illinois in May, 1934. The clause under consideration there is identical with that involved in the present case. The plaintiff in that case contended that the total disability should refer only to the business in which the plaintiff was engaged at the time of his injury, that is general contracting and carpentering and concrete work. We quote from that opinion as follows:

"The policy provides that after one full annual premium shall have been paid, if the insured will furnish the company with due proof that he has been wholly disabled by bodily injuries, or disease, and will be permanently, continuously, and wholly prevented thereby for life from engaging in any occupation or employment for wage or profit, the company will waive any future premiums and make the payments agreed upon."

\* \* \* \* \*

"There are two general types of contract of insurance: One wherein a policy provides for indemnity if the insured is disabled from performing any work or following any occupation. Such policies are commonly known and designated as total disability policies. The other kind which provides for indemnity if the insured is disabled from transacting duties pertaining to the occupation in which the insured is then engaged. These are commonly termed and designated as occupational disability policies. It is generally recognized that there is a fundamental difference between these two classes of insurance, and the risk assumed by the insurer in the policy. It must be determined from the contract of insurance alone whether the risk assumed falls within one class or the other."

\* \* \* \* \*

"The author last cited says: 'Total or permanent disability to perform or direct any kind of labor or business means that the disability must not only be total, but that it must also be permanent so far as the ability to perform or direct any kind of business is concerned. Total disability naturally means being totally disabled from all kinds of business, unless by the contract the disability is to be only from the usual occupation of the assured.'

"Our courts have held that the relation of an insurance company to its policy holders is purely contractual. There is ordinarily no element of trust relation involved. The parties, being competent to contract, have a legal right to insert such provisions in the agreement as they see proper, and it is the duty of the courts to construe and *enforce such agreements as are made and not make new contracts for the parties.* *Blume v. Pittsburg Life & Trust Co.*, 263 Ill. 160.

"The Supreme Court, in the case of *Norwaysz v. Thuringia Ins. Co.*, 204 Ill. 334, in discussing the rules of construction of a policy of insurance said: 'Contracts of insurance are

to be construed like other contracts. If ambiguous terms are used, the meaning more favorable to the insured will be adopted, not because he is the sufferer in a recent loss or because of a disparity in the financial condition of the two parties, but because the words are those of the insurer and the ambiguity is chargeable to it. Where, however, there is no ambiguity in the terms, neither party is to be favored. If the stipulation is one that the parties could lawfully make, and, having been made, is not actually or inferentially waived, *it is the function of the court to enforce its observance as the parties made it, and not to make a new agreement for the purpose of mollifying the hardship that the rigorous and inflexible terms occasion.*'' (Italics ours.)

It is difficult to imagine a clearer statement of the meaning of a contract and its application to a particular case than the language as used by the court above, and we have quoted from that decision rather generously. Either the limitation or the extension of plain language as here used is in effect to make a new contract between the parties, and this no court has a right to do. It is immaterial that the contract sued upon may not produce the result to fit a special case, but that is not the fault of the contract where the language is plain and unambiguous, but is the fault of the parties or a circumstance not in contemplation of the parties. As to the construction to be given to such plain language in an insurance contract see *Bergholm v. Peoria Life Insurance Company*, 284 U. S. 489, 52 S. Ct. Rep. 230. The Supreme Court there said:

"It is true that where the terms of a policy are of doubtful meaning, that construction most favorable to the insured will be adopted. *Mutual Ins. Co. v. Hurni Co.*, 263 U. S. 167, 174; 44 S. Ct. 90; 68 L. Ed. 235; 31 A. L. R. 102; *Stipcich v. Insurance Co.*, 277 U. S. 311, 322; 48 S. Ct. 512; 72 L. Ed. 895. This canon of construction is both reasonable and just, since the words of the policy are chosen by the insurance company; but it furnishes no warrant for avoiding hard consequences by importing into a contract an ambiguity which otherwise would not exist, or, under the guise of construction, by forcing from plain words unusual and unnatural meanings.

"Contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary, and popular sense."

A very recent case somewhat along the same line is *Mc-*

*Donald v. Equitable Life Assurance Society* (Maryland), 173 Atl. 580. In that case the policy appeared to provide benefits where the insured had "become totally and permanently disabled by injury or disease". \* \* \* "Its disability shall be deemed to be total when it is of such an extent that the insured is prevented thereby from engaging in any occupation or performing any work for compensation of financial value."

The plaintiff there claimed that by reason of certain heart trouble he was precluded from performing his usual work. There was conflict in the evidence as to just what his trouble was. The court went on to comment upon the evidence that the man was able to go about, went to stores and the barber shop, and made a trip by train from Cumberland to Texas, and would take rides in automobiles. The appellate court of Maryland held that this did not show a disability insured against and affirmed the judgment of the lower court which was in favor of the insurance company.

There are numerous cases supporting the views as expressed above, but the decisions here quoted are so directly in point that we feel it is not necessary to quote further authority.

Plaintiff, in the court below, relied upon two Virginia cases, which we think we should mention in presenting this petition. The first is that of *Atlantic Life Insurance Co. v. Worley*, 172 S. E. 168. In that case the question was raised as to the payment of premiums between the time of the beginning of the disability until the death of the insured, and the question of disability was divided into two departments, one pertaining to a total disability for life and the other to a disability continuously for a period of three months immediately preceding the receipt of proofs. No such provisions as are involved in that case obtain in the case under consideration. Our Supreme Court, in the opinion written by Justice Gregory, at page 171 of that report, discusses the meaning of the term "total and permanent disability", and at page 172 lays down a test of construction, which, if followed, would have terminated in a very different result in the Brinkley case. We quote as follows:

"Total and permanent disability, as used in insurance policies, is a relative expression. It does not mean absolute incapacity, mental and physical. The term must be construed rationally and practically, and the trial court should have instructed the jury on the meaning of total and permanent disability in the light of the almost unanimous judicial interpretation of those words. The jury should have been told

that the disability contemplated by the policy did not mean a state of absolute helplessness, *but meant the inability to do substantially all of the material acts necessary to the prosecution of any occupation for remuneration or profit in substantially the customary and usual manner in which such occupation is prosecuted.* This would have been an equitable and reasonable interpretation of the term. Contracts of insurance should receive a reasonable construction so as to effectuate the purposes for which they are made. Legal effect should be given to the language used, and the object to be accomplished by the contract should be considered in interpreting it. Such a rule would not require the literal interpretation which would render it necessary that the insured be in a condition of complete helplessness, mentally and physically, and totally unable to do anything at all."

The injury to the plaintiff, in the Worley case, was of a very serious nature, and is set out in detail on page 173 of the opinion; and he was so incapacitated that at best he could perform only trivial duties. The extent of the injury is so different, and the rule of law applicable thereto is not the same as would be applicable in the present case. Therefore, the contention of Brinkley, which was upheld by the court, is not in conformity with the meaning of the Worley case.

The second case is that of *Metropolitan Life Insurance Co. v. Myers*, 172 S. E. 279. In that case the insured was suffering from Hodgkin's disease, which the physician certified permanently disabled him, and which almost invariably resulted fatally. The physician also testified that he would be unable to perform any labor or engage in any usual occupation. It was advised that he should get a certain amount of fresh air and exercise, but should do no manual or physical labor of any sort, and this advice by his physician was merely for the purpose of prolonging the man's life. How different this situation is from that of Mr. Brinkley, who has his health and is perfectly normal except for this one phase of disability, and who can do anything that any other normal man can do that will not require the full use of both hands. We think that the expressions of our court through Justice Browning are very appropriate in dealing with such a situation and that the appellate court of Virginia in this very case has sanctioned the position which we take in the Brinkley case. Our authority for this statement is the paragraph on page 281, which is as follows:

"Many of the cases which have had to do with the effect of insurance policies, with terms similar to the ones here, have

been concerned with accidents in which a hand or a leg, or some member, was lost. One of the cases cited by the appellant dealt with an accident in which the hand of a railroad employee was cut off, and the claimant was asked what he could do. His response was that he could do anything that a one-armed man could do. The appellate court denied him the recovery which he had secured in the lower court, and we think, rightly. See *Buckner v. Jefferson Standard Life Ins. Co.*, 172 N. C. 762; 90 S. E. 897. Language was used in the case, relating to the construction of the terms of the policy, which was doubtless appropriate in view of the facts of that case."

In the case of *Buckner v. Jefferson Standard Life Insurance Company* (N. C.), 90 S. E. 897, the assured had his left hand cut off five inches above the wrist. Otherwise there was no disability, and the Supreme Court of North Carolina reversed the decision of the lower court and denied a recovery under a clause of total disability. It will be noted in the quotation above that Justice Browning comments upon this case and adopts its principles by saying: "The appellate court denied him the recovery which he had secured in the lower court, and we think rightly."

We contend, therefore, that the effect of these two Virginia decisions is to support our contention under the facts of the present case.

### ORAL PRESENTATION.

Counsel presenting this petition for a writ of error desire to state orally the reasons for reviewing the decision complained of, and respectfully request that they be allowed to make a statement of the case as provided for by the rules of this Court.

A copy of this petition was delivered to counsel of record for the plaintiff on the 16th day of November, 1934.

### CONCLUSION.

In this case the facts are very free from conflict, as plaintiff's witnesses have fairly stated the man's condition, and we are confronted with a legal construction of the terms of the contract of insurance. We respectfully submit that the judgment of the trial court is plainly wrong, especially in view of our appellate court's approval of the North Carolina case above quoted, and petitioner adopting this petition as brief prays that to the judgment aforesaid a writ of error

may be awarded, its case may be reviewed and judgment entered in this case for the defendant, the Travelers Insurance Company.

Note: The case of *Sibley v. The Travelers Insurance Company*, from the appellate court of Illinois, is not found in the reporter system. We are advised that this case has recently been affirmed by the Supreme Court of Illinois and that it will appear in the advance sheets in *Northeastern Reporter* within the next few weeks. We are therefore attaching a copy of it to this petition.

Respectfully submitted,

THE TRAVELERS INSURANCE COMPANY,  
By HUGHES, LITTLE & SEAWELL, Its Attorneys.

LEON T. SEAWELL, Counsel.

State of Virginia,  
City of Norfolk, to-wit:

I, Leon T. Seawell, an attorney practicing in the Supreme Court of Appeals of Virginia, do certify that in my opinion the judgment complained of in the foregoing petition should be reviewed by the Supreme Court of Appeals of Virginia.

Given under my hand and dated this 17th day of November, 1934.

LEON T. SEAWELL.

Received Nov. 19, 1934.

M. B. WATTS, Clerk.

January 15, 1935. Writ of error and *supersedeas* awarded by the Court. Bond \$2,500.00.

M. B. W.

COPY

AT A TERM OF THE APPELLATE COURT

Begun and held at Ottawa, on Thursday, the first day of May, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present—The Hon. Fred G. Wolfe, Presiding Justice; Hon. Franklin R. Dove, Justice; Hon. Blaine Huffman, Justice; Justus L. Johnson, Clerk; E. J. Welter, Sheriff.

Be It Remembered, that afterwards, to-wit: On May 10, 1934, the opinion of the Court was filed in the Clerk's office of said court, in the words and figures following, to-wit:

*Nason Sibley v. Travelers' Insurance Company*, Gen. No. 8,769.

Mr. Presiding Justice Wolfe delivered the opinion of the court.

Nason Sibley brought an action against the Travelers' Insurance Company, to recover certain instalments which he claims are due him under a permanent disability clause in a certain life insurance policy, issued to him by the Travelers' Insurance Company, on November 3, 1920. The suit was started on November 25, 1932. The declaration consists of only one special count.

The declaration recites a formal execution and delivery of the policy in question, the payments of the premiums, as well as a full compliance with the various general requirements of the policy, and avers that on March 15, 1930, he, the complainant, "became wholly disabled by bodily injury or disease and became and was permanently and wholly prevented thereby from engaging in the business of a general contractor, carpenter, *concrete and* Superintendent, or working therein or thereon, and has since said time been permanently, wholly and totally so disabled, etc." The policy and the application are copied into the declaration and are made a part thereof. These are the pertinent and necessary averments presented, to consider the questions raised by the parties to this suit. To this declaration the defendant filed a plea of general issue; a jury was waived and the case was submitted and heard by the court without a jury.

The contract of insurance sued upon is a life insurance policy providing that in the event of the death of the insured the beneficiary named therein shall receive 240 instalments of \$100 each to be made upon the proof of the death of the insured. The policy is the usual life insurance policy with additional total disability features. The policy contains a provision, that is commonly designated and known as a "total and permanent disability clause". It is by virtue of this provision that the plaintiff is seeking to recover. The policy provides that after one full annual premium shall have been



paid, if the insured will furnish the company with due proof that he has been wholly disabled by bodily injuries, or disease, and will be permanently, continuously and wholly prevented thereby for life from engaging in any occupation or employment for wages or profit, the company will waive any future premiums and make the payments agreed upon.

Under the terms of this policy the payment of disability benefits do not reduce the liability of the company on the amount of life insurance payable to the beneficiary upon the death of the insured, but these payments are in addition thereto. In case of permanent disability the company waives the payment of premiums during such disability, which are not to be deducted in any settlement of the insurance policy.

Upon the hearing of the case, the plaintiff submitted to the court one proposition of law, which is as follows: "Permanent total disability, as provided by the contract sued on, means inability to do substantial material acts necessary to the prosecution of the insured's business, or occupation, in his customary and usual manner so long as he shall live and suffer such disability." The court held this to be the law governing the case.

The defendant submitted three propositions of law which the court refused to hold as the law governing the case. The first proposition is: "The Court holds that before the plaintiff can recover in this case as same has been submitted, he must allege and prove by the greater weight of the evidence that he has become wholly disabled by bodily injuries, or disease, and will be permanently, continuously, and wholly prevented thereby for life from engaging in any occupation or employment for wage or profit." (2) "The Court holds as a matter of law under the terms of the policy in question, the plaintiff cannot recover without showing that he is incapacitated, not only from following his usual occupation, but also from pursuing any other gainful occupation." (3) "The Court holds as a matter of law that the plaintiff cannot recover in this cause because he is totally disabled from pursuing his own trade or business, if he retains his health, strength and physical and mental ability sufficient for the pursuance of some other vocation; and if it appears from the evidence that the plaintiff is able to do or perform any occupation or employment for wage or profit, then the finding should be in favor of the defendant."

Upon the hearing of the case the court found that the plaintiff has been permanently, continuously and totally disabled within the meaning of the "total and permanent disability clause" of said policy, and found for the plaintiff in the sum of \$1,648.42, which sum is made up of monthly installments

of \$173.06 from April 15, 1932, to November 25, 1932, the date of the commencement of the suit and a premium payment of \$437.37 claimed to have been made by the plaintiff under protest.

On this finding the court rendered judgment. The defendant took and preserved proper exceptions to the various rulings of the court and has brought the same to this court on appeal, to reverse the judgment.

Nason Edward Sibley also perfected an appeal to this court claiming that the court erred in not rendering judgment for motion of the Travelers' Life Insurance Company the cases the full amount of the payments that were due him during the life of the policy; that case is general number 8774. On were consolidated in this court.

The questions presented to this court are: Whether the declaration states a cause of action and whether the plaintiff has proven a case that entitled him to recovery under the disability clause of the policy of insurance. The appellant contends that the language of the policy is clear and unambiguous and does not need a construction of a court to ascertain the meaning of the language used in the policy. The appellee's contention is that if the evidence shows that the plaintiff was disabled so that he could not engage in the business in which he was engaged at the time of the injury, which was general contracting, and carpentering and concrete work, then he was totally disabled so far as the terms of the policy provided.

There are two general types of contract of insurance: One wherein a policy provides for indemnity if the insured is disabled from performing any work or following any occupation. Such policies are commonly known and designated as total disability policies. The other kind which provides for indemnity if the insured is disabled from transacting duties pertaining to the occupation in which the insured is then engaged. These are commonly termed and designated as occupational disability policies. It is generally recognized that there is a fundamental difference between these two classes of insurance and the risk assumed by the insurer in the policy. It must be determined from the contract of insurance alone whether the risk assumed falls within one class or the other.

We have not been advised of, or of our own research, we have not been able to ascertain where our Supreme Court has ever passed upon or construed the language of a policy similar to the one in this case. Our Supreme and Appellate Courts, in construing other policies of a similar nature, have given us information that is valuable in arriving at the mean-

ing of this policy. The courts of other jurisdictions are not in harmony upon the question.

The appellee has cited several Illinois cases, in which he contends that the court has decided that the disability referred to in this policy means that the insured only needs to show that he was disabled as far as engaging in the work in which he was engaged at the time of his injury and disability. The first case cited is *Plattdeutsche Grot Gilde v. Ross*, 117 Ill. App. 247. In this case the main question was: Was the insured actually sick or so sick as to be unable to do work of any kind? The question of the construction of the policy of insurance was not involved. In the case of *Davis v. Midland Casualty Co.*, 190 Ill. App. 338, the case was decided on a question of fact whether a farmer who was injured while driving a young horse hitched to a buggy was injured so badly that he came within the terms of the policy. The court finally states that the question of total disability was a question of fact, to be decided by the trial court. In the case of *Baker v. State's Accident Ins. Co.*, 200 Ill. App. 473, the question before the court was the meaning of the words in the policy "necessarily confined in the house". The court held in that it was not necessary for the party to show that he was confined to his bed, or confined to the house all of the time in order to recover on the policy, but such things as going to his doctor or going out in the yard for a short time would not prevent a man from recovering under a policy that said that the man must be so sick that it would necessarily confine him in the house.

In the case of *Missouri State Life Insurance Co. v. Copas*, 265 Ill. App. 478, where the question arose as to whether the insured was totally disabled as required by the language of the policy of insurance, the court says: "in the arguments of counsel it seems to have been construed that appellee must be totally and permanently incapacitated for any purpose before he can recover upon the contract in question, and growing out of this construction arose the objections to the argument of counsel for appellee to the jury that the appellee must be 100 per cent deficient before he is totally and permanently disabled." The court then quotes from the case of *Taylor v. Southern States Life Ins. Co.*, 106 S. C. 356, which holds that the injured person need not be 100 per cent deficient before he is wholly and permanently disabled. In the case of *Steffan v. Bankers Life Co.*, 267 Ill. App. 248, the court, in this case, discusses the policy of insurance that required: "If the insured becomes totally and permanently disabled as herein provided \* \* \* from any cause originating after the date of the policy, etc., and upon receipt

of due proof of such disability existing for 90 days, then the company would pay the insured certain stated amounts." The court held in this case, as both our Supreme Court and Appellate Court, in early decisions, have held, that a man to be totally disabled need not be completely helpless, but only to such an extent that he is unable to perform manual labor necessary to entitle him to receive earnings. In the late case of *Wood v. Prudential Ins. Co.*, 271 Ill. App. 103, this case was decided on a question of fact as to whether the insured was so disabled as to prevent him from following a gainful occupation. They cite and follow *Missouri State Life Ins. Co. v. Copas*, 265 Ill. App. 478.

In the case of *Grand Lodge B. of L. F. v. Orrell*, 206, 208, Orrell sued the defendant lodge on a beneficiary certificate claiming that he was totally and permanently incapacitated from performing manual labor due to an accidental injury. The trial court, at the request of the plaintiff, gave an instruction to the jury defining what the term "Manual labor" meant. The instruction given and the comments of the Supreme Court upon the same are hereby quoted.

"The term 'manual labor', in its ordinary and usual meaning and acceptation, means labor performed by and with the hands or hand, and it implies the ability for such sustained exercise and use of the hands or hand as will enable a person thereby to earn a livelihood. Being able to temporarily use the hands or hand at and in some kind of labor, but without the ability to sustain such ordinary exercise and use of the hands at some useful labor whereby money may be earned to substantially assist in earning a livelihood at some kind of manual labor, does not constitute the ability to perform manual labor as it must be understood was contemplated by the parties to the indemnity contract sued upon and relied on in this action.

"The purpose of this instruction was to define the meaning of the words 'manual labor', and to advise the jury as to the physical condition which would constitute total incapacity to perform manual labor. Counsel for appellant lodge insist that the phrase 'Total incapacity' means absolute and complete inability to perform any labor whatever with the hand or hands, and the criticism upon the instruction is that it erroneously advised the jury that the appellee may be regarded as totally incapacitated though he be not absolutely incapacitated to use his hand or hands in some manner of useful labor. The construction given by the instruction is proper. The condition of absolute and complete incapacity to do manual labor ought not to be regarded as the true construc-

tion of the language of the by-law. Total inability to perform manual labor to an extent necessary to entitle him to receive earnings is what is meant. One who has power to use his hand or hands at labor for a brief effort only, and who is lacking in power to sustain the effort for a sufficient length of time and make the result thereof of any benefit to him in the way of assistant in his support, is for all practical purposes and in every actual sense totally incapacitated from performing manual labor."

In the case of *Maccabees v. King*, 79 Ill. App. 145, the Appellate Court of the First District, in discussing a case where the material clause of the insurance policy, is as follows: "In case of permanent and total disability the insured would be entitled to certain benefits", in its opinion says: "His certificate is that he will be entitled, etc., 'in case of permanent and total disability', as provided in the laws of the order, and the by-laws under which he claims is that 'Any member holding a benefit certificate who shall become totally and permanently disabled from any cause \* \* \* to perform or direct any kind of labor or business \* \* \* shall be entitled', etc."

Appellee was not insured as a stone or brick mason, or with reference to any particular occupation or calling, but the decisions in cases in which the insurance was with reference to a particular occupation or calling are in point, in so far as they define total disability to perform the duties of the particular occupation or calling. The law in such cases is that the insured, in order to recover, must have been disabled to perform the duties of the occupation in reference to which he was injured. Bliss on Life Insurance, 2nd Ed., sec. 403; Niblack on Ben. Societies, etc., sec. 402; 4 Joyce on Ins., sec. 3031.

The author last cited says: "Total and permanent disability to perform or direct any kind of labor or business means that the disability must not only be total, but that it must also be permanent so far as the ability to perform or direct any kind of business is concerned.

"Total disability naturally means being totally disabled from all kinds of business, unless by the contract the disability is to be only from the usual occupation of the assured."

Our courts have held that the relation of an insurance company to its policyholders is purely contractual. There is ordinarily no element of trust relation involved. The

parties, being competent to contract, have a legal right to insert such provisions in the agreement as they see proper, and it is the duty of the courts to construe and enforce such agreements as are made and not to make new contracts for the parties. *Blume v. Pittsburg Life & Trust Co.*, 263 Ill. 160.

The Supreme Court, in the case of *Norwaysz v. Thruingis Ins. Co.*, 204 Ill. 334, in discussing the rules of construction of a policy of insurance said: "Contracts of insurance are to be construed like other contracts. If ambiguous terms are used, the meaning more favorable to the insured will be adopted, not because he is the sufferer in a recent loss or because of a disparity in the financial condition of the two parties, but because the words are those of the insurer and the ambiguity is chargeable to it. Where, however, there is no ambiguity in the terms, neither party is to be favored. If the stipulation is one that the parties could lawfully make, and, having made, is not actually or inferentially waived, it is the function of the court to enforce its observance as the parties made it, and not to make a new agreement for the purpose of mollifying the hardship that the rigorous and inflexible terms occasion." To the same effect is the case of *Bergholm v. Peoria Life Ins. Co.*, 284 U. S. 489, in which that court said: "It is true that where the terms of the policy are of doubtful meaning, that construction most favorable to the insured will be adopted. This canon of construction is both reasonable and just, since the words of the policy are chosen by the insurance company; but it furnishes no warrant for avoiding hard consequences by importing into a contract an ambiguity which otherwise would not exist, or, under the guise of construction, by forcing from plain words unusual and unnatural meanings."

It is our opinion before the plaintiff, in this case, can recover under this contract of insurance, it is necessary for him to aver and prove that he became wholly disabled by bodily injury or disease and will be permanently, continuously and wholly prevented thereby for life *from engaging in any occupation or employment for wages or profit.*

An examination of the evidence disclosed that the appellee, after his injuries, drove his automobile on various occasions to adjourning cities, and that in November, 1931, he took his family to California in his automobile and returned to his home in Antioch, Illinois, in the same way; that he and his family stopped at different camps en route and while in California he drove his car to various places on business trips and amusement; that he is a member of certain clubs and business organizations; that he is a member of the board of

trustees of the village of Antioch and attends the various meetings for the transaction of business that comes before said board; that he remains at these meetings a considerable length of time. He attends social gatherings, picnics, theatres, and plays bridge for extended periods, and at some of the entertainments, dances with his wife and other acquaintances. He makes frequent visits to his friends around his home and goes down town on business and to the post-office regularly. He visits the various stores and performs errands while he is down town. He makes trips by automobile and elevated train to his physician in the city of Chicago unassisted. On some of these trips he walks up the stairs to the elevated station and is away from home practically the whole of the day. He drives his car to the City of Chicago, puts it into a garage and drives back home unassisted and does other chores around his home. From this evidence we are of the opinion that the plaintiff has not proved that he is totally and permanently, wholly disabled, by bodily injuries or disease, nor that he had become permanently and wholly prevented thereby from engaging in the business of general contractor, carpenter, *concrete* and superintendent and working therein and thereon as claimed in the declaration.

The plain provisions of this policy provide that before the plaintiff can recover in this case he must become wholly disabled by bodily injuries or disease and will be permanently, continuously and wholly prevented thereby for life from engaging in any occupation or employment for wage or profit. These provisions fall within that classification which provides for indemnity if the insured is disabled from performing any work or following any gainful occupation.

We can only consider the contract as the parties made it. We cannot help the beneficiary to escape the unfortunate consequences of an unwise or improvident contract made by the insured. There is no uncertainty or ambiguity about the words as used in this contract of insurance. It is therefore our opinion that the trial court erred in finding the issues for the plaintiff, and holding as a matter of law, the proposition of law submitted by the plaintiff, but the court should have held the law to be as stated in appellant's proposition (1), (2), and (3), as being applicable to this case.

The appellee, in his appeal, general number 8774, assigns an error that the court erred in not allowing him the present value of the instalments payable during the natural expectancy of his life. Under our decision in this case it is not necessary to decide that question. It is our opinion that the declaration in this case does not state a cause of action which

would entitle him to recover under the terms of this policy of insurance. The judgment of the circuit court of Lake County should be and is hereby reversed.

*Judgment reversed.*

M. B. WATTS, Clerk.

## RECORD

### VIRGINIA:

Pleas before the Circuit Court of the City of Portsmouth, at the Court House thereof, on the 5th day of October, 1934.

Joliff S. Brinkley, Plaintiff,

*v.*

The Travelers Insurance Company, a foreign corporation,  
Defendant.

### UPON A MOTION TO RECOVER MONEY.

Be it remembered, that heretofore, to-wit: In the Clerk's Office of the Circuit Court of the City of Portsmouth, on the 23rd day of June, 1934, came the plaintiff, by his counsel, and filed his notice of motion, which is in the words and figures following, to-wit:

To the Travelers Insurance Company,  
Hartford, Connecticut.

You are hereby notified that I shall on the 23rd day of July, 1934, at 10:30 A. M. or as soon thereafter as I may be heard, move the Judge of the Circuit Court of the City page 2 } of Portsmouth, Virginia, for a judgment and award of execution against you for the sum of Two Thousand Dollars (\$2,000.00) which sum of money is due from you to the undersigned for this, to-wit:

That heretofore, to-wit, on the 9th day of April, 1925, you issued to the undersigned plaintiff, Joliff S. Brinkley, a life insurance certificate, bearing serial number 35, for the principal sum of \$2,000.00 as a part of a contract of group insurance issued to the Norfolk & Portsmouth Belt Line Railroad Company, which contract is your policy number G-3669,



and among other provisions contained in said certificate and policy the said Travelers Insurance Company agreed and undertook as provided by the terms and conditions of the said certificate and policy, that in the event of the total and permanent disability of the said Joliff S. Brinkley, before having attained the age of 60 years, that the said Travelers Insurance Company would pay to the said Joliff S. Brinkley the amount of insurance in force on his life, said amount being the sum of two thousand dollars (\$2,000.00), upon receipt of due proof of said disability by the company.

The said certificate of insurance bearing number 35 issued to Joliff S. Brinkley, makes reference to the terms and conditions of a certain group policy numbered G-3669, which policy contained sundry provisos, conditions, prohibitions, and stipulations; the undersigned Joliff

page 3 } S. Brinkley has paid his share of the premiums as they became due, and did perform, fulfill, observe, and comply with the said provisos, conditions, and stipulations, and has not at any time violated any of the prohibitions in the said certificate and policy contained, according to the form and effect, true intent and meaning of the said policy and certificate.

That while said certificate and policy were in full force and effect, the said Joliff S. Brinkley became totally and permanently disabled on the 11th day of May, 1933, such total and permanent disability being within the meaning of the said certificate and policy, and that such total and permanent disability has continued to the present time and will continue the remainder of his natural life and that due proof of such disability as required under the terms of the aforesaid certificate and policy has been submitted to the Travelers Insurance Company, that upon such proofs of total and permanent disability and the demand for payment under the said certificate and policy, the defendant, The Travelers Insurance Company has failed, neglected and refused payment and still does fail, refuse and neglect to make payment of this claim.

Wherefore, Joliff S. Brinkley, the undersigned, prays for a judgment and award of execution against you in the sum of \$2,000.00, together with his costs in this case by him expended.

JOLIFF S. BRINKLEY,  
By MALCOLM G. ROBINSON,  
Counsel.

VENABLE, MILLER, PILCHER and PARSONS, and  
MALCOLM G. ROBINSON, p. q.

page 4 } And the return of the Sergeant of the City of Richmond, Virginia, on the foregoing notice of motion is in the words and figures following, to-wit:

Executed in the City of Richmond, Va., June 22nd, 1934, by delivering in duplicate a copy of within Notice to Peter Saunders, the Secretary of the Commonwealth of Virginia and as such Secretary of the Commonwealth the Statutory Agent for The Travelers Insurance Company, a foreign corporation. Place of residence and place of business of said Peter Saunders being in the City of Richmond. Va. Fee of \$2.50 paid to the Secretary at time of service. Sergeant's fee \$.50. John G. Saunders, Sergeant of Richmond, Va. By J. H. Floyd, Deputy Sergeant.

And at another day, to-wit: At the Circuit Court of the City of Portsmouth, held on the 23rd day of July, 1934.

And this day came the parties by their Attorneys, and thereupon, the defendant, by counsel, tendered a plea of "General Issue", to which plea the plaintiff, replied generally and issue is joined thereon, and thereupon, on motion of the defendant, leave is given it to file Special Pleas within Five (5) days from the entry hereof.

page 5 } And at another day, to-wit: At the Circuit Court of the City of Portsmouth, held on the 6th day of September, 1934.

At this day came again the parties by their Attorneys and thereupon, came a jury, to-wit: Nathan Cohen, A. T. Webb, T. M. Rowe, M. Barney, L. B. Parks, J. P. M. Joyce and James S. Rea, who being duly sworn the truth, upon the issue joined, and having partly heard the evidence; whereupon, the defendant, Travelers Insurance Company, a foreign corporation, by counsel, moved the Court to strike out the evidence as to it, which motion being heard, the Court doth overrule the same, to which ruling of the Court, the defendant, by counsel, excepted; and thereupon, the jury having fully heard the evidence and argument of counsel, retired to their room to consult of their verdict and after sometime returned into Court, having found the following verdict: "We the jury find for the plaintiff and fix the damages in the sum of \$2,000.00. Two Thousand dollars. A. T. Webb, Foreman;" whereupon, the defendant, by counsel, moved the Court to set aside the verdict and enter judgment for defendant on the grounds that the said verdict is contrary to the

law and evidence, which motion being heard, the Court doth overrule the same, to which ruling of the Court, the defendant, by counsel, excepted; whereupon, the defendant, by counsel, moved the Court to set aside the verdict and grant it a new trial on the grounds that the said verdict is contrary to the law and evidence, which motion being heard, the page 6 } Court doth overrule the same, to which ruling of the Court, the defendant, by counsel, excepted; it is therefore considered by the Court that the plaintiff recover against the defendant, the sum of Two Thousand (\$2,000.00) Dollars, with interest thereon to be computed after the rate of Six per cent per annum from the 6th day of September, 1934, till paid, and his costs by him amout his suit in this behalf expended.

And the said defendant in Mercy, &c.

But at the instance of the defendant, who desires to present a petition for a writ of error and a *supersedeas* to the judgment entered in this cause, execution hereof is suspended for a period of Sixty (60) days from the date of this judgment, when the defendant or someone for it, shall give bond before the Clerk of this Court, with surety to be approved by the said Clerk, in the penalty of Twenty-five Hundred (\$2,500.00) Dollars, payable to the plaintiff in this cause, with a condition reciting said judgment and the intention of said defendant to present such petition, and providing for the payment of all such damages as any person may sustain by reason of such suspension in case a *supersedeas* to such judgment should not be allowed and be effectual within the time above specified.

page 7 } And at another day, to-wit: In the Clerk's Office of the Circuit Court of the City of Portsmouth, on the 29th day of September, 1934, the following notice was filed, which is in the words and figures following, to-wit:

To Joliff S. Brinkley,  
Messrs. Venable, Miller, Pilcher & Parsons, Attorneys, and  
M. G. Robinson,

TAKE NOTICE, that on the 5th day of October, 1934, the undersigned will apply to the Clerk of the Circuit Court of the City of Portsmouth, Virginia, for a transcript of the record in the cause of Joliff S. Brinkley, *v.* The Travelers Insurance Company, for the purpose of presenting said transcript to the Supreme Court of Appeals of Virginia along

with a petition for writ of error to the judgment of said court rendered in said cause on the 6th day of September, 1934.

Norfolk, Virginia, September 29, 1934.

HUGHES, LITTLE & SEAWELL,  
Attorneys for The Travelers  
Insurance Company.

Service accepted, this 29 day of Sept., 1934.

MALCOLM G. ROBINSON,  
VENABLE, MILLER, PILCHER & PARSONS,  
Attorneys for Plaintiff.

page 8 } And now at this day to-wit: At the Circuit Court  
of the City of Portsmouth, held on the 5th day of  
October, 1934.

At this day came the parties by their attorneys and the defendant tendered its Bill of Exceptions Number 1, which was this day signed by the Judge of this Court and made a part of the record of this case, after it appearing, in writing, that counsel for said plaintiff had been given proper notice according to law of the time and place of tendering said Bill of Exceptions Number 1.

The Bill of Exceptions Number 1 referred to in the foregoing order is in the words and figures following, to-wit:

page 9 } Virginia: In the Circuit Court of the City of  
Portsmouth.

Joliff S. Brinkley

v.

Travelers Insurance Company.

#### RECORD.

Stenographic report of testimony and other incidents of the trial of Joliff S. Brinkley v. Travelers Insurance Company, tried before the Hon. B. D. White, and jury, in the Circuit Court of the City of Portsmouth, Virginia, on September 6th, 1934.

Present: Messrs. Venable, Miller, Pilcher & Parsons (Mr. Parsons), and Mr. M. G. Robinson, for the plaintiff; Messrs.

Hughes, Little & Seawell (Mr. Leon Seawell), for the defendant.

J. M. Knight,  
Shorthand Reporter,  
Norfolk, Virginia.

page 10 } Note: Opening statements were made by counsel for the respective parties.

Mr. Parsons: Mr. Seawell, I understood from your opening that you admit demand has been made and payment refused?

Mr. Seawell: Yes.

Mr. Parsons: Let the record show Mr. Seawell agrees that demand has been made and payment refused. We offer in evidence, if the court pleases, insurance certificate under group life policy No. G-3669, dated April 9th, 1925, and issued to the plaintiff, Joliff S. Brinkley. Gentlemen of the jury, this is the certificate of insurance issued to Joliff S. Brinkley and it in part reads as follows: "If any employee shall furnish the company with due proof that while insured under this policy and before having attained the age of sixty, he has become wholly disabled by bodily injuries or disease, and will be permanently, continuously and wholly prevented thereby for life from engaging in any occupation or employment for wage or profit, the company will waive further payment of premium as to such employee and pay in full settlement of all obligations to him under this policy the amount of insurance in force hereunder", which is \$2,000.00.

page 11 } Note: The policy was thereupon marked "Exhibit 1".

JOLIFF S. BRINKLEY,  
the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. Parsons:

Q. You are Joliff S. Brinkley?

A. Yes, sir.

Q. This group insurance certificate was issued to you, was it not?

A. Yes, sir.

Q. And the premiums kept up on it regularly?

A. Yes.

Q. And it was in full force and effect at the time you became disabled?

A. Yes, sir.

Q. And is now?

A. Yes, sir.

Q. Mr. Brinkley, were you injured, and when?

A. Sir?

Q. Have you been injured and disabled; if so, when?

A. I was injured the 11th day of May, 1935.

page 12 } Q. Can you show to the jury your injury?

A. My left hand.

Q. Have you been able to do any work since receiving that injury?

A. No, sir.

Q. Are you able to do any now?

A. No, sir.

Q. Has your hand gotten in any better condition since you were injured?

A. No, sir.

Q. Were you advised as to whether or not that is a permanent condition?

Mr. Seawell: I object to that. The doctor will state that.

The Court: I sustain the objection.

By Mr. Parsons:

Q. In your present condition, are you able to engage in any usual and customary duties which you are qualified to do?

Mr. Seawell: I object.

The Court: Overruled.

Mr. Seawell: Exception.

By Mr. Parsons:

Q. Did you understand the question?

A. Yes, sir.

Q. What is your answer?

A. No, sir.

page 13 } Q. Describe how your hand affects you—what is the matter with it—as to what disables you.

A. I have got a stiff thumb and my muscles is—the tendons under here has got my hand tied so I can't close it and can't grab anything, and can't hit my hand against anything but that I have pains, and during cold weather it is a terrible pain to that hand, and rainy weather, and I have got an ache through here (indicating), and my nerves is exposed on the top of the hand and it hurts me, and walking down the street with my wife, if I happen to strike her it hurts me and I have to move it, and I can't depend on it for anything.

Q. Have you ever been engaged in any occupation other than as a railway trainman?

A. Clerk with the—when I first started railroading way back in 1912.

Q. What kind of clerk?

A. Yard clerk.

Q. Are you able to do any kind of railroad work now?

A. No, sir.

Q. In your present condition can you do railway trainman's work?

A. No, sir.

By the Court:

Q. What was your occupation at the time you were injured?

A. Conductor on the railroad.

page 14 }

#### CROSS EXAMINATION.

By Mr. Seawell:

Q. Mr. Brinkley, the accident is to the back of your left hand, isn't it?

A. The back and front, too.

Q. Of your left hand?

A. Yes, sir.

Q. And by reason of the injury to that left hand you say that you are unable to fully close the hand; is that correct?

A. Fully close it?

Q. Yes.

A. I can't close it, no, sir.

Q. You can't grasp anything to lift it?

A. No, sir.

Q. With that left hand?

A. No, sir.

Q. Mr. Bankley, how old are you?

A. 36 years old.

Q. Where do you live?

A. 1626 McDaniel Street, Portsmouth.

Q. You say that you started out with the railroad company as a clerk?

A. Yes, sir.

Q. In what department?

A. What department?

Q. Yes.

page 15 }

A. I was with the Atlantic Coast Lnie.

Q. In what department?

A. Yard office.

Q. In the yard office?

A. Yes.

Q. What other positions have you held besides that first position?

A. Brakeman, and I was in the Service during the World War as a soldier; and I came back from the World War and I was promoted to conductor, and have been conductor ever since on the Belt Line with the exception of a very short period in 1922 when I was sent back to brakeman again.

Q. This accident occurred on May 11th, 1933, did it not?

A. Yes, sir.

Q. And since that time you have performed services, have you not?

A. Since that time?

Q. Yes.

A. I was around at the American Legion awhile, but I didn't have any particular duty put on the home committee and they donated me a little something for looking out and staying around there; no work attached to it.

Q. As a matter of fact, you took charge of the American Legion for awhile, did you not?

A. While the house manager was suddenly taken to the hospital they asked me to take charge until he come  
page 16 } back, and that was about a month and a half.

Q. For awhile you acted there at a salary of \$10.00 a week, did you not?

A. For awhile, yes, sir.

Q. And after that you acted there at a salary of \$20.00 a week?

A. No, sir.

Q. How much?

A. \$15.00. It was only a matter—the chairman of the home committee give me this money to stay there, and I never have been hired by them. I was a member of the some committee by appointment of the Commander.

Q. Didn't you take charge of the office of the American Legion until they got a permanent man?

A. No, sir. They had an Adjutant to take charge of that.

Q. You say they never asked you to take charge?

A. They asked me to look out for the home until the man arrived back from the hospital, which I did voluntarily.

Q. Did you do that man's work while he was in the hospital?

A. I overlooked after the place. I didn't do any work around there to amount to anything. The head man has to stay around there.



Q. Didn't you stay there until the permanent man arrived sometime in the latter part of May, 1934?

A. From what time do you mean I started?

Q. From the time you began. I don't know when page 17 } you began.

A. I don't know when I began either, but I stayed there about 30 days or, I judge, a month and a half in this man's place.

Q. And part of that time you got \$10.00 a week and the rest of the time you got \$15.00 a week?

A. Part of the time, yes, sir.

Q. Mr. Brinkley, you drive an automobile, do you not, sir?

A. No, sir.

Q. Haven't you driven an automobile since this accident?

A. Yes, sir.

Q. What kind of automobile?

A. Essex.

Q. Is it your automobile?

A. It was. It is not mine. I got it broke up.

Q. Up to the time your automobile was broken up you drove it, did you not?

A. My wife and myself together.

Mr. Seawell: That is all, sir.

#### RE-DIRECT EXAMINATION.

By Mr. Parsons:

Q. Mr. Brinkley, did you drive an automobile for wages?

A. No, sir.

Q. Can you drive an automobile like you used to, in the usual and customary manner?

A. No, sir.

page 18 } Q. Have you attempted to try to get a job to see whether you could qualify to drive an automobile?

A. Yes, sir.

Q. Were you able to get one?

A. No, sir.

Q. You had no regular job at the American Legion, but were put on the home committee?

A. Yes, sir.

Q. Was there any benefit attached to your membership there?

A. No, no benefit.

Q. Through your membership you were put on duty kind of as a watchman to look out for the place?

Mr. Seawell: I object to that. He has already testified as to that.

The Court: He has already answered.

By Mr. Parsons:

Q. What was the nature of your duties at the American Legion?

A. Before I went there I was hanging around there practically all the time from ten o'clock in the morning until around six o'clock in the afternoon, and I had nothing else to do, so I stayed around the club. When this boy was taken sick and had to go to the hospital, we had a home committee meeting and they asked me if I would mind taking it over until this boy came back, which I did, and in return they gave me \$10.00 a week.

Q. Did you do about the same thing after you page 19 } were put on the committee as you did before?

A. Yes, sir. We had a meeting there once a week of the home committee and I was in charge of buying, which is no salary attached to it whatever.

Q. No physical work attached to it?

A. No, sir.

#### RE-CROSS EXAMINATION.

By Mr. Seawell:

Q. You say you have applied for a job to drive an automobile?

A. I applied for a job as salesman for an automobile firm in Portsmouth.

Q. What firm was that?

A. Hudgins—Merton & Hudgins.

Q. You say you and your wife drove your automobile up to the time it was wrecked, and Mr. Parsons has asked you if you could drive it in the usual way. In what manner would you drive it?

A. Naturally I would drive with my right hand. I could not drive with my left hand. I could not hold it with my left hand at all because it would jar my hand on the steering gear, and I had to put it in the window of the car to keep from having any jar, and would hold it up off the top of the door. What little driving I have done I have done with my right hand only.

Q. So that was the difference, you drove with page 20 } your right hand instead of both hands?

A. Sir?

Q. You drove with your right hand instead of both hands?

A. What do you mean by difference?

Q. The difference between your driving before the accident and after the accident?

A. Yes, sir.

Q. In this American Legion Club didn't you also operate the restaurant there?

A. No, sir.

Q. You didn't operate the restaurant there?

A. No, sir.

Q. Where is that club located?

A. 423 London Street.

Q. Did you operate a soda fountain there?

A. No, sir.

Q. They have no refreshments of any kind?

A. Yes, sir.

Q. In what way?

A. We have a beer cabinet there and soft drinks.

Q. Do you know Mr. T. H. Williamson of the Belt Line Railroad?

A. Very well, sir.

Q. Isn't it a fact, Mr. Brinkley, that since this accident occurred he has offered you work with the Belt Line Railroad?

A. No, sir, it is not.

page 21 } Mr. Parsons: Do you expect to disprove that?

By Mr. Seawell:

Q. I ask you that for the reason that I—

A. I asked him for work at the Belt Line.

Q. For the reason I expect to prove by Mr. Williamson that he did offer you work and you refused it.

A. (No response.)

By Mr. Parsons:

Q. Mr. Brinkley, did you, or not, hear Mr. Williamson testify on the witness stand that he would not give you a job?

A. I think I did. I am not positive of that.

Mr. Seawell: Now, if your Honor pleases, may I suggest to counsel that I have a record of that trial here, and since he has asked the question I would much prefer that he look at the testimony of Mr. Williamson because I know he doesn't want to purposely misquote him.

Mr. Parsons: I may have the question mixed up with the trial of the Jennings case.

Mr. Seawell: I think you have.

By Mr. Parsons:

Q. What was it Mr. Williamson offered you?

A. I went to Mr. Williamson in August with a bandage on my hand and asked him to give me a job I could handle until my hand come around, until I could go back in train service, if it ever did, and he told me, says, "Aren't you satisfied walking around the street and getting paid for page 22 } this?" and I said, "If I am getting paid for this but I haven't received anything for it yet".

Q. He never did offer you a job?

A. No, sir. He asked me to come back in train service sometime the early part of this year and see if my hand would allow me to do work and the doctor had me in charge, the Belt Line physician, and he never did tell me I ought to go back to work and I figured he was the man to tell me to go back.

Q. Could you do the train service?

A. No, sir.

Q. Is that the reason you didn't go back?

A. Absolutely.

By Mr. Seawell:

Q. Which August was this that you say you had this first conversation with Mr. Williamson, August of this year, or—

A. Last year, August, 1933. I would not say for sure it was in August, but I think it was the latter part of August.

Q. You say you went to him then and asked him for a job to carry you over until your hand healed?

A. Yes, sir; asked him for a clerk's job.

Q. And at that time he refused to give you a clerk's job, you say?

A. Yes, sir.

Q. And you said also in answer to Mr. Parson's question that you had not gone back to work because the page 23 } Belt Line doctor had not told you you could go back to work?

Mr. Parsons: That is not all he said.

Mr. Seawell: I understand it was.

A. The doctor has told me on numerous occasions, not only the company doctor, but other doctors, that I was disabled for train service.

By Mr. Seawell:

Q. What doctors?

A. Dr. McAlpine, Dr. Brooks, Dr. Dunford and several other doctors.

Q. Did you tell Dr. McAlpine, or go to him and ask him if you could go back or try to go back to work for the Belt Line after Mr. Williamson offered you a job?

A. I don't recall.

Q. If you didn't go to him and ask him, why do you say he wouldn't tell you to try?

A. Who told me that?

Q. Dr. McAlpine?

A. Dr. McAlpine has never told me to go back to work.

Q. You told Mr. Parsons that one of the reasons you didn't go was that Dr. McAlpine had not told you that you could go back and do train work. Now you say Mr. Williamson did offer you a job sometime this year?

A. He didn't offer me a job. I had a job on the Belt Line all the time. My seniority give me a job on the Belt Line if I was able to ever go back again, which I am not  
page 24 } able.

Q. Did you say he did offer you a job the first part of this year?

A. No, sir.

Q. What did you say?

A. I said it was told to me.

Q. What did you say Mr. Williamson said to you the first part of this year?

A. What did he say?

Q. Yes. You have testified here about something Mr. Williamson offered you the first part of this year.

A. He called me up on the 'phone and asked me to come to his office, that he wanted to see me, and I went by there and he asked me why I didn't try to go back to work. Mr. Williamson didn't know whether I was able to do work, or not. He asked me why didn't I try to do it, and the doctor said I was not able to do it and I said I was not, and I figured they knew more about it than Mr. Williamson, and the doctor had never turned me loose.

Q. When Mr. Williamson told you that did you then go back to Dr. McAlpine and tell him you had been offered this work and ask him if it was proper for you to try to do it?

A. I could not say whether I did, or not.

Q. Wouldn't you remember that?

A. I don't remember. If I did I would tell you.

Q. Don't you think, if you had had a job offered you, you would go back and ask him?

page 25 } A. I say I don't recall whether I asked him. If he said I asked him, I will take his word.

Q. And if he says you didn't ask him, will you take his word for that?

A. Yes.

Q. What kind of job was it you asked for in August, 1933?

A. Yardmaster's clerk in Berkley.

By Mr. Parsons:

Q. And you didn't know whether you could handle that?

A. No, sir.

Q. That was a question of trying?

A. That is right.

DR. J. C. DUNFORD,

sworn on behalf of the plaintiff, testified as follows:

Examined by Mr. Parsons:

Q. Your name is Dr. J. C. Dunford?

A. Yes, sir.

Q. How long have you been practicing medicine, Doctor?

A. Been in Portsmouth 24 years.

Q. Do you know Mr. Brinkley?

A. Yes, sir.

page 26 } Q. Have you had occasion to examine him and look over him?

A. Yes, sir.

Q. State, Doctor, whether the injury you found totally and permanently disables him for any active duty.

Mr. Seawell: If your Honor pleases, I suggest that the form of the question—

The Court: I think it is leading.

Mr. Parsons: I don't know how I could call the doctor's attention to what I want to know. I said whether he was actively disabled.

The Court: I didn't catch it then.

By Mr. Parsons:

Q. State whether or not the condition you found Mr. Brinkley in disabled him from any active work?

A. Yes, sir.

Q. Is that, or not, a permanent condition?

A. Yes, that is a permanent condition with him.

Q. Would he, in your opinion, Doctor, be able to do any railway service?

A. No, sir; that is practically impossible, an occupation that he has to grasp these grab-irons on the car, and jump

off and alight on cars. The man has no power in his hand at all. His contracting tendons are gone. His flexes are all right. He can't close his hand or grab anything.

A. Yes, sir.

Mr. Seawell: For the record I would like to move here that this question and answer be stricken out because page 27 } the contract which has been introduced and read doesn't limit this to just one form of service but applies to any employment of any character.

The Court: Objection overruled.

Mr. Seawell: Note an exception.

By Mr. Parsons:

Q. Doctor, state whether or not this man has been, since you examined him or have seen him, or will be able to do any manual labor or work of any type?

A. Not with that hand, his left hand.

Q. Will he ever be able to follow any manual work of any type in the customary and usual manner of such work?

Mr. Seawell: May I suggest that my objection be noted to all of this type of testimony so that I won't have to repeat it?

Mr. Parsons: All right.

By Mr. Parsons:

Q. State whether or not he will ever be able to do any manual work or labor in the usual manner and customary way in which such work is done?

A. Not with that left hand.

Q. Does the injury and condition of that left hand interfere with such duties as I have asked you about?

A. Yes, sir, to the extent, I believe of 100%.

page 28 } CROSS EXAMINATION.

By Mr. Seawell:

Q. In making your statement, Doctor, when you say totally disabled, I notice that you always qualify it by saying the left hand?

A. Yes, sir.

Q. You had reference to his ability to use that one particular part, the left hand?

A. Yes.

Q. You don't mean to imply there was anything wrong with the right hand?

A. No, sir.

Q. Or any other portion of the body?

A. Yes, sir.

Q. But your testimony is limited to the use of the left hand?

A. The left hand.

Q. As far as the left hand is concerned, in your opinion, he will not be able to use it for any type of manual labor or train service?

A. Yes.

Q. And as far as the right hand is concerned—

A. I don't think there is any ailment in the right hand at all, sir.

### RE-DIRECT EXAMINATION.

page 29 } By Mr. Parsons:

Q. Mr. Seawell has asked you some questions casting a different light on what you told me just now. State whether or not the condition of the left hand, regardless of the condition of his right hand, disables him as you stated.

A. Yes.

Q. It isn't a condition solely to the hand itself?

A. If I employ a man I would want him to have two good hands.

### RE-CROSS EXAMINATION.

By Mr. Seawell:

Q. Doctor, as a matter of fact, you know of a great many people who are employed and who have the use of only one hand, do you not?

A. Yes, but if I employed a man I would want him to have two good hands.

Q. Of course. But, as a matter of fact, you don't mean to imply that because a man has one hand rendered useless he is useless otherwise?

A. No, sir.

By Mr. Parsons:

Q. You have said he was useless for a great many things. He might be able to sell peanuts?

A. He could stand on the corner and sell newspapers.



page 30 } DR. VERNON A. BROOKS,  
sworn on behalf of the plaintiff, testified as follows:

Examined by Mr. Robinson:

Q. Dr. Brooks, how long have you been practicing medicine?

A. In the City of Portsmouth for 30 years.

Q. The most of it has been in Portsmouth?

A. Yes.

Q. Did you treat Mr. Brinkley?

A. No, sir, only examined him.

Q. Only examined him?

A. Yes, sir.

Q. When did you first see him?

A. I examined him about March 29th, 1934.

Q. Did you make an X-ray of his hand?

A. Yes.

Q. Had an X-ray previously been taken?

A. I was told not.

Q. Will you tell the court and jury the result of your examination?

A. In my examination of his hand I made an X-ray picture. The X-ray picture showed two fractures, one of the ring finger of the left hand in the proximal phalanx from the knuckle joint of the hand just about over to where the man wears his ring, and showed that the fracture had healed up in good position. The metacarpal bone of the index finger, which is the bone from where the finger joins on the hand to  
page 31 } the main bones, had been fractured and healed with right much deformity, and the bone had been broke and thrown over against this bone of the thumb.

Q. Could you explain it better by having Mr. Brinkley up there?

A. Yes, sir. In this injury, one fracture was right here in this proximal phalanx of the ring finger. That has healed up perfectly with no deformity present and does not, to my mind, contribute anything at all to his hand trouble. This bone from the metacarpal bone of the index finger, which is this bone from here to here, has been broken through (indicating). The bone has healed, but instead of in a straight line as it should have been, it has healed with deformity, an angular deformity towards the thumb. This bone is not back. This metacarpal bone of the index finger is not back with the metacarpal bone of the thumb. He has here (indicating) a particularly tender spot on the back of his hand due to a nerve that was exposed by cutting in the scar tissue. On the

back of his hand his tendons have been cut through. Right at the fascia, which is that portion of the integument of the hand immediately below the skin, that has been destroyed in this area about an inch to an inch and a half wide by about two inches long, and the muscles covering the back of the hand have been destroyed. This part of the tendon is embedded into the scar tissue. That is the extent of his closing his hand (illustrating). It is restricted by these tendons that you see on the back of my hand embedding themselves in the scar tissue. It is impossible to dissect this scar tissue without destruction of the sides in the tendons and to get them back together. In my judgment this hand is permanently and totally disabled from pursuing manual labor, railroad work that requires setting brakes or uncoupling cars or climbing ladders, or any manual work of that kind.

### CROSS EXAMINATION.

By Mr. Seawell:

Q. Doctor, this disability is to his left hand, is it not?

A. Yes, sir.

Q. With reference to this touchiness, or whatever you might describe it, you say that is caused by the end of the nerve being caught in the scar tissue?

A. Yes.

Q. That can be relieved, can it not, by—

A. A slight operation.

Q. On the back of the hand?

A. Yes, sir.

Q. Doctor, your testimony with reference to disability and the permanency of it is, of course, restricted to the use of that left hand, is it not?

A. His left hand is totally disabled, and his left hand is a part of his anatomy and contributes to his total disability. In other words, if you work on the theory that one hand never knows what the other hand does, I can answer your question affirmatively, but one is predicated upon the other.

Q. You don't mean to imply, Doctor, by your testimony that there was anything wrong with his right hand or the rest of his anatomy?

A. *Per se*, no, but as a part of his anatomy, as a companion part of his anatomy, it affects the other part.

Mr. Seawell: That is all, sir.

JOLIFF S. BRINKLEY,  
the plaintiff, recalled, testified as follows:

Examined by Mr. Parsons:

Q. Mr. Brinkley, I forgot to ask you when did you start railroad service, how old were you?

A. About 14 years old, or 13, something like that.

Q. Were you ever qualified to do anything other than railroad work?

A. No, sir.

Q. How far did you go in school?

A. Through the fourth grade in grammar school.

page 34 } Mr. Parsons: That is our case.

DR. LOUIS A. McALPINE,  
sworn on behalf of the defendant, testified as follows:

Examined by Mr. Seawell:

Q. Have you been sworn, Doctor?

A. Yes, sir.

Q. What is your name?

A. Louis A. McAlpine.

Q. Doctor, how long have you been practicing medicine?

A. 18 years.

Q. In what place?

A. I don't understand you.

Q. In what place?

A. Portsmouth entirely.

Q. Of what school are you a graduate?

A. Medical College of Virginia.

Q. Did you treat Mr. Brinkley, the plaintiff here, for his injury?

A. Yes, sir.

Q. I believe you were acting as surgeon for the Belt Line, were you not, sir?

A. Yes, sir.

page 35 } Q. You have heard Dr. Brooks testify with reference to the injury to his left hand?

A. Yes, sir.

Q. Do the injuries as he has described them exist in the left hand from what you found, sir?

A. Not exactly, no, sir.

Q. What difference is there?

A. Well, in the first place, Mr. Brinkley hasn't any tendons in his hand severed at all. Those tendons, the disability, consists of the tendons being involved in the scar tissue on the

back of his hand, and those tendons naturally can't slide like they should and it prevents him from gripping his fist tight. The fracture that Dr. Brooks found I don't think contributes at all to his disability because there is no apparent deformity there at all and because the fracture has healed, and the hand doesn't close for the simple reason that the tendons don't permit it to.

Q. How long did you attend Mr. Brinkley?

A. The date of the accident was May 11th; is that right?

Q. Yes.

A. From May 11th until June 24th-27th. That is wrong. I saw him longer than that.

By Mr. Parsons:

Q. It was December, wasn't it, Doctor?

A. Yes, December 7th.

page 36 } By Mr. Seawell:

Q. Doctor, Mr. Brinkley has stated here that sometime around the first part of this year he was offered some kind of position with the Belt Line by Mr. Williamson, and he finally stated that he didn't recall whether he had come to ask you whether he should attempt it or whether he didn't. Will you please state whether he ever came and asked your authority or your advice as to attempting the job?

A. My attitude has been in reference to Mr. Brinkley's going back to his job this. I don't know whether Mr. Brinkley can do his work as conductor, or not. I have never done any of that work myself, and I don't know how much he can lift with his hand, and I don't know whether, of necessity, a conductor has to grab irons and uncouple cars. I know they do it, but I don't know whether they of necessity have to do it, and I am not testifying Mr. Brinkley is unable to do that work. I think he is honest in what he stated, but he misunderstood me, I think. I never told him he was 100% disabled. The attitude I took any time he asked me—

Mr. Parsons: I don't think we ought to go into the question of his attitude.

By Mr. Seawell:

Q. State if Mr. Brinkley came to you and asked you whether or not he should attempt this job Mr. Williamson offered him the first part of this year?

A. He was asked to go back and try his work and see if he could do it.

page 37 } By Mr. Parsons:

Q. Were you there, or are you speaking from hearsay?

A. Mr. Brinkley told me that.

By Mr. Seawell:

Q. Who told you that?

A. Mr. Brinkley told me that, and Mr. Brinkley, of his own volition, didn't desire to do that. Whether he could have done his work, or not, I don't know.

Q. Did you give him any advice about it?

A. I didn't tell him he could or could not. I was willing for him to try to do it to see if he could do it.

Q. What did Mr. Brinkley say about it?

A. He didn't desire to do it.

Q. Now, Doctor, irrespective of the left hand, from your experience as a doctor and your knowledge, and from your observation of Mr. Brinkley and your knowledge of him as a man, what is your opinion as to whether or not he is totally disabled from doing work of any character, not limiting it particularly to railroad work, but work of any kind?

Mr. Parsons: It ought to be confined to substantial work, and not trivial work.

The Court: In which he has been trained?

Mr. Seawell: No, I didn't ask him that. That is not either the contract or the authority, I submit, sir.

The Court: I think that it is, Mr. Seawell.

page 38 } Mr. Seawell: It is a question we will meet in the argument.

The Court: I guess you can go ahead and ask him. I don't think it will affect the final result as to the instructions.

By Mr. Seawell:

Q. Will you answer it?

A. You ask me if Mr. Brinkley is wholly and totally disabled from doing any kind of work?

Q. That is right?

A. I don't think he is.

Q. As a matter of fact, Doctor, in your experience, have you, or not, known of men gainfully employed who had the use of only one hand?

Mr. Parsons: We object to that. The elements in the other cases may not be the same as in this. They may have had different training.

Mr. Seawell: At the same time it is a question of the physical ability rather than the mental.

The Court: The Doctor has already testified. I sustain the objection to that question.

Mr. Seawell: Note an exception, please.

By Mr. Seawell:

Q. Doctor, is there any other disability to this man other than to his left hand?  
page 39 } A. No, sir.

### CROSS EXAMINATION.

By Mr. Parsons:

Q. Doctor, you have stated you don't know whether he could do railroad service, or not?

A. No, sir.

Q. And you don't know what else he could do? You think he could do some mental work?

A. Yes.

Q. That same kind of work would be necessarily different from what he could do normally if he had the use of both hands? He could not do the same work in the customary and usual manner with one hand as he could with both hands?

A. You ask me the same question in a different way. I said I didn't know whether he could do work as a conductor, or not.

Q. You do know, however, that he could not do the same work in the usual and customary manner, the same kind of work, with one hand as he could do with both hands?

A. I don't think he could do as much work as he used to do.

Q. And that means he could not do it in the same manner as he could before?

A. No.

Q. By work, I suppose you mean he could sell peanuts on the street?

A. I don't think it is as bad as that, Mr. Parsons.  
page 40 } I think—I mean if he had a job as clerk, I think he could hold it down, clerical work.

Q. Suppose he had continuous pain in this scar tissue, would you want to hire a man who was continually complaining of pain?

A. It is pretty hard to get a job anywhere now.

Q. And it would be very hard to get a job in that kind of condition?

A. I think it would be more difficult.

Q. He could not do this kind of work as effectively as if he didn't have it?

A. No, I don't think so.

Q. He does have exposed nerve tissue?

A. Yes.

Q. And it is very tender?

A. Yes. It could be corrected.

Q. I notice just now when Dr. Brooks touched his hand he would jump.

A. It is sensitive naturally.

Q. You say the tendons are so tight they won't close?

A. The injury consisted of the skin being pulled down over the tendons like you have a close fit. When it brought back part of the skin sloughed and scar tissue took the place of it. Instead of the tendons sliding properly, they are fixed and it has limited the motion of his fingers.

Q. So the tendons are destroyed?

page 41 } A. Yes.

Q. With the exception of that, the testimony if Dr. Brooks with reference to his condition is correct?

A. I don't think the fractures have anything to do with his disability.

Q. Did you take an X-ray of it?

A. No, sir.

Q. Dr. Brooks did?

A. Yes.

Q. You say it didn't appear in the X-ray?

A. No, but I say the X-ray don't show disability

Q. The X-ray shows a fracture?

A. That is all right.

Q. If he found it from the X-ray, you say you don't think there is a fracture?

A. No; I said I didn't think the fractures contribute to his disability.

Q. The fracture together with the rest of the injury has caused the disability?

A. No, the fracture, I don't think, caused any of it. The fracture was a part of the injury; that is true.

Q. There was a fracture that caused the crushing of the bone in the hand?

A. No, I don't think—Dr. Brooks didn't say that.

Q. The metacarpal bone?

A. He didn't say they were crushed.

page 42 } Q. But was fractured?

A. The fracture didn't necessarily contribute to any disability. A fracture, with proper treatment, will heal as good as ever.

Q. There was a deformity as testified to by Dr. Brooks.

A. Due to—

Q. Deformity of the metacarpal bone?

A. He hasn't a gross deformity due to the fracture.

Q. The X-ray is nothing but a picture of the deformity?

A. Yes.

Q. What is the difference there?

A. He can have some deformity of a broken bone that don't show up.

Q. Still if you get it in the X-ray it is there?

A. It might be, but don't contribute to the disability necessarily.

Q. The injury of the broken bones together with the rest of his injury caused the disability?

A. No; the broken bone, in my opinion has nothing to do with the disability.

Q. Did you remove any muscles out of the tissue?

A. He had some destruction of the muscle to the ball of his thumb on the left hand.

Q. He can't close that hand?

A. He has a loss of muscle use there.

page 43 } By Mr. Seawell:

Q. I understand, Doctor, that this nerve condition in the back of the hand which causes him this pain you say can be corrected?

A. That is due to a small nerve filament that has caught up in the scar tissue. You can usually localize that down to the point of a pin. I haven't heard anything about it before, but it can be localized. We get a nerve caught up in here (indicating) frequently and it is stuck.

By Mr. Parsons:

Q. You don't know whether it can be localized in this case, or not?

A. No. He said it could be.

By a Juror:

Q. How about the thumb?

A. I wouldn't say that about the nerve except that I heard Dr. Brooks say it could be corrected by a simple operation. He has evidently localized it and knows about it.

By Mr. Parsons:

Q. That would remove the tender spot?

A. These nerves are so small you cannot see them with your eye.



Q. That would not remove the disability, that operation?

A. No. It is the pain.

Q. You just remove the pain from that particular point?

A. Yes.

page 44 } DR. FOY VANN,  
sworn on behalf of the defendant, testified as follows:

Examined by Mr. Seawell:

Q. You have been sworn, Doctor?

A. Yes, sir.

Q. Your name is Dr. Foy Vann?

A. Yes.

Q. How long have you been practicing medicine, Doctor?

A. Soon will be 30 years.

Q. Of what school are you a graduate?

A. Medical College of Virginia.

Q. Are you a specialist in any line, sir?

A. Orthopedic surgery.

Q. How long have you specialized in orthopedic surgery?

A. 17 years.

Q. You live in Norfolk, do you not?

A. Yes.

Q. Doctor, have you had occasion to examine Mr. Joliff S. Brinkley's hand?

A. Not in the sense that I would be able particularly to discuss the whole problem. I saw him when he was first injured, when he was in the hospital. The next time I saw him he came to my office. At neither of those times did I make any notes or record of it. I have seen him at odd times informally, two or three times. I know his injury is to his left hand.

Q. From your observation of him that you have  
page 45 } made recently, state whether or not his left hand is permanently and totally disabled.

A. Well, with respect to the thumb I think it is, but there is a little motion of the finger joints. He has got a little motion, not full motion, not half, but a little motion in the finger joints. In the thumb there is no motion. I think the fingers are 80% disabled, or ninety. The fingers are not disabled, you might say, from shaking hands, or taking hold of them. The thumb is totally disabled, and the fingers show some motion.

Q. In your experience, have you had to do any attending of persons who have lost the use of one hand or some part of the body?

A. Yes.

Q. What has been the extent of that experience, Doctor?

Mr. Parsons: I think that ought to be more specific. One man might be able to do something that another man might not. It involves his education and qualification.

The Court: I overrule the objection. Let it go.

Mr. Seawell: All right, sir.

A. It is right hard for me to say offhand. I can recall quite a few people who are disabled, with one hand, that are employed in gainful positions by making use of that hand in a passive way. It is like an artificial limb, so to page 46 } speak. I could name quite a few. There is a man on the police force, motorcycle officer, over here in Norfolk, and a man over here as watchman for the Seaboard Road. His name is Brinkley. There is another man down here in Knotts Island carrying on farming with one hand. I know three who collect industrial insurance around, and another one who is a painter, a house painter. I know another man who runs a livery stable, and still another one who is attending a gasoline station.

By Mr. Seawell:

Q. From your experience and from your observation of Mr. Brinkley, what is your opinion as to whether or not he is permanently and totally disabled from carrying on any form of gainful occupation?

Mr. Parsons: I make the same objection and exception.

The Court: And the same ruling.

A. I would say he is not totally or permanently or continuously disabled from entering into some gainful occupation.

### CROSS EXAMINATION.

By Mr. Parsons:

Q. Doctor, that man's hand, as has been testified, has got the ligaments tied up with the scar tissue. Is that what prevents him from closing his hand?

A. Being incarcerated in the scar tissue. I will page 47 } have to repeat again that recently I haven't had an opportunity to make a careful examination of Mr. Brinkley's hand.

Q. You don't know whether he—

A. As far as his total or specific disability to the left hand is concerned, I mean maximum 100%, I haven't had an opportunity to satisfy my own self about that.

Q. Would you attempt to say that he was capable of going back in train service?

A. I should not think so. I wouldn't think so.

Q. Doctor, a man in his condition can't follow the ordinary active manual work that a man who has no disability? A man who has been following railroad service since he was 13 or 14 years old, with that disability, could not do manual labor in the same usual and customary manner that a man could with both hands, could he?

A. No.

Q. Then his hand is permanently and totally disabled to that extent, that he can't do it in the usual and customary manner?

A. No. He has got a disability to the left hand.

Q. And that applies to any kind of work?

A. Yes.

page 48 }

JOLIFF S. BRINKLEY,  
the plaintiff, recalled, testified as follows:

Examined by Mr. Seawell:

Q. I hand you this paper and ask you if that is your signature to it?

A. That is it, yes, sir.

Q. That is your signature?

A. Yes, sir.

Q. Did you also write that date, May 24th, 1934?

A. Yes, sir.

Q. It seems to be the same.

A. Yes.

Mr. Seawell: I ask that this be marked as an exhibit.

Note: The paper was thereupon marked "Exhibit A".

Mr. Parsons: May I ask for what purpose it is introduced? I object to it and ask that it be stricken out unless he states some reason for it. I don't know that the man's signature would be involved.

Mr. Seawell: I want to show the character of the man's handwriting. I presume it was his right hand, of course.

Mr. Parsons: For that purpose I have no objection.

page 49 } T. H. WILLIAMSON,  
sworn on behalf of the defendant, testified as follows:

Examined by Mr. Seawell:

Q. Have you been sworn, Mr. Williamson?

A. Yes, sir.

Q. Your name is T. H. Williamson?

A. Yes.

Q. You are connected with the Belt Line Railroad, I believe?

A. Yes, sir.

Q. In what capacity, sir?

A. Superintendent.

Q. Do you know Mr. Joliff S. Brinkley, the plaintiff in this case?

A. Yes, sir.

Q. Has he been in your employ for a number of years?

A. Yes, sir.

Q. Mr. Williamson, this accident occurred, I believe, in May, 1933?

A. Yes, sir.

Q. At which time Mr. Brinkley sustained an injury to his left hand?

A. Yes, sir.

Q. Did you have any conversation at all with Mr. Brinkley subsequent to that time concerning any work with the railroad?

A. Subsequent to the accident?

Q. Yes.

page 50 } A. I had numerous conversations with Mr. Brinkley, Mr. Seawell, pertaining to work. I just don't know to what you refer now.

Q. Did you ever talk with him concerning his returning to his duties as conductor?

A. Yes, sir.

Q. Do you remember about when that was?

A. I don't. It was pretty well after Mr. Brinkley's hand had healed up and he was demonstrating the use of his hand as far over as he could close it, and Mr. Brinkley was apparently very anxious to get back to work. In the discussion I asked him whether or not he could perform the duties of conductor. He said that he didn't know. I said, "Well, Mr. Brinkley, in order not to advise you wrongly, I would suggest that you try it without prejudice and satisfy yourself as well as the management of the company".

Q. Did Mr. Brinkley make that effort in accordance with your suggestion?

A. No, sir, he didn't, sir.

Q. Did he come to see you again after that about going to work, or what did he do?

A. I had numerous conversations with Mr. Brinkley and at each time more or less there was a discussion entered into about settlement.

Q. That is with the Belt Line?

A. Yes, with the railroad company for personal page 51 } injuries. I took the position that settlement could not be amicably reached until such time as the nature of his injuries would be determined, and the only way to determine it was whether or not he could do work as a conductor.

Q. And you say that after your suggestion to him to make an attempt and demonstrate whether he could, or not, without prejudice to anyone's rights, he didn't elect to make an attempt?

A. No, sir.

### CROSS EXAMINATION.

By Mr. Parsons:

Q. Mr. Williamson, a man who had no claim against your company and who would come to you in Mr. Brinkley's condition, you would not put him in train service, would you?

A. Let me hear that again.

Q. I say a man coming to you in his condition with his hand, not being able to close it or do work as an able bodied man who didn't have that disability, you wouldn't put him in train service, would you?

A. No, I would not hire a new man in that condition.

Q. And the only consideration of your giving him a chance to do the work was he has been hurt in railroad service and had a claim against the company, and that was to determine whether or not he could do the work?

A. In fair justice to the employee. He still had page 52 } a right to go back to work if he elected to do so by seniority rights, which is supported by contract.

Q. If he could do the work?

A. Yes.

Q. But another man who was in his condition would constitute a possible danger and liability on the company?

A. Yes, they have to be able bodied for train service.

Q. When you spoke of satisfying the management, you are practically the one who controls that?

A. Yes; I referred to myself because I am the operating head.

Q. And if you found or he found he could not do the work as others he would not be in train service, would he?

A. No.

Q. And after he tried it and had come to the doctor and the doctor advised him it was dangerous not only to him but to other people, you would not let him remain in the work?

A. Well, now, Mr. Parsons, I would not go by the doctor's ideas. I would rather be governed by the man and my own notions together.

Q. You would have to go somewhat by the man's idea himself?

A. The type of man, in the first place, and he would have to qualify first.

Q. A man in train service is often placed in position where he has to use practically all of his physical force?

A. Yes.

page 53 } Q. And if he felt it was dangerous for him to do it, you could not control that?

A. No, absolutely.

Q. You would have to leave that to him?

A. On the other hand, if he felt he could do the work, I would go with him on that.

Q. Naturally he would be somewhat governed by his conferences with the doctors?

A. I could not answer that.

Q. You don't for a minute deny that he has got a permanent condition do you?

A. I don't think the doctor has got to tell Mr. Brinkley what condition he has got. He is a competent judge of that. I told you I would rely on his judgment along that line.

By Mr. Seawell:

Q. Mr. Williamson, from your observation of him and knowledge of him, do you know of any better way of ascertaining whether he could do the work than to try it?

A. No, I don't.

By Mr. Parsons:

Q. You said something about seniority rights. Would you put him back to work under the seniority rights since he has brought action or suit against your company?

A. Since he has?

Q. Yes.

A. No, sir.

page 54 } Q. He no longer has any rights?

A. No. He forfeits his seniority rights when he brings legal action against the company.

Q. Then he could not go back to work on your road now?

A. No, sir.

Q. That is because you disagreed as to what you should pay him and he had to go in court?

A. Not disagreeing. I don't know whether it ever reached that point.

Q. Anyway, you had to go in litigation?

A. Yes, as to liability, since you want to bring that out.

Q. There is no question about that now, is there?

A. Oh, yes, there is.

Q. The court said there is not.

A. The Court of Appeals has to pass on it first. We are still convinced, Mr. Parsons.

Mr. Seawell: That is all, sir. The defendant rests.

The Court: Gentlemen, if you want to step out in the hall, do so, but don't talk to anybody or allow anybody  
page 55 } to talk to you or in your hearing concerning this case.

Note: The jury retired.

Mr. Seawell: If your Honor pleases, the court having heard all of the evidence, both for the plaintiff and the defendant, I want to make a motion to strike out the evidence of the plaintiff, since it appears by the language of the clause sued under, it only covers a case where the assured has become wholly disabled by bodily injuries or disease, and will be permanently, continuously and wholly prevented thereby for life from engaging in any occupation or employment for wage or profit. The evidence in this case, both of the plaintiff's witnesses and of the defendant's witnesses, even if we admit for the sake of argument that his left hand is disabled permanently from any use, shows that he is not permanently and totally disabled from following any employment for wage or profit, and he has not brought himself within the terms of his contract and, therefore, as a matter of law he should not recover.

Mr. Parsons: I don't think there is any necessity to argue it. It is a question for the jury, I think.

The Court: I overrule the motion.

page 56 } Mr. Seawell: Note an exception.

page 57 } Thereupon, the following instruction was offered and granted on behalf of the plaintiff.

#### INSTRUCTION 4-P.

"The court instructs the jury that the language of the policy, 'wholly disabled by bodily injury or disease, and will be permanently, continuously and wholly prevented thereby for life from engaging in any occupation for wage or profit' the vocation of the insured not being designated, should be construed as meaning the vocation or calling in which the insured might be following at the time he became disabled, and not any vocation whatever which he might be able to follow after he had been disabled, and if you believe from the evidence that the plaintiff will be permanently, continuously and wholly prevented from following his usual occupation he is entitled to recover of the defendant the sum of \$2,000."

Mr. Seawell: We object to the granting of Instruction No. 4-P because, in the first place, from the testimony of the plaintiff's own doctors it is shown that this disability they speak of is confined, of course, to his left hand and the rest of his body is perfectly all right otherwise, and they don't pretend to say that he cannot do any other kind of work, therefore, we don't think this instruction ought to be given, and we object further on the ground that they use the word  
page 58 } "vocation" or "calling" which the insured might be following at the time he is disabled which is not provided in this case because it is not so stated in the contract, the contract here not referring to his vocation, but leaving it out.

I notice that he also has near the bottom of No. 4, "And if you believe from the evidence that the plaintiff will be permanently, continuously and wholly prevented from following his usual occupation", which is objectionable because he might go out here and run a restaurant, he might go out and get a job as a watchman, or he might get a job as collector for industrial insurance, or he might make a credit man, but just because he can't do the work of a trainman, according to this instruction, he would be entitled to recover. We contend that it is not the meaning of the contract, and it should not be so restricted.

page 59 } Thereupon, the following instructions were offered on behalf of the plaintiff and refused by the court:



## INSTRUCTION 1-P.

“The court instructs the jury that the insured might be able to do some light and inconsequential work out of line with his usual and customary duties and still, this fact, if it should be a fact, would not preclude his recovery for total and permanent disability insurance, and if you believe from the evidence his disability is such that common care and prudence require him to desist from transacting business pertaining to his occupation, and if in fact he is unable to do his usual and customary work in substantially the usual and customary manner, the plaintiff is entitled to recover from the defendant the sum of \$2,000.00.”

## INSTRUCTION 2-P.

“The court instructs the jury that if you believe from the evidence that the plaintiff’s condition is such that he could not in the exercise of ordinary prudence, perform any substantial part of the duties necessary to a practical prosecution of his railroad occupation, in substantially his customary and usual manner, disregarding trivial work he may have done which was not material or substantial in his vocation but which may have been incidental thereto, he is totally and permanently disabled within the meaning of the terms of the policy, and is entitled to recover of the defendant  
page 60 } the sum of \$2,000.00.”

## INSTRUCTION 3-P.

“The court instructs the jury that the term “total and permanent disability as used in this policy of insurance is a relative expression. It does not mean a state of absolute helplessness but it means the inability to do all the substantial and material acts necessary to the prosecution of the insured’s business or occupation in his customary and usual manner.”

Thereupon, the following instructions were offered and granted on behalf of the defendant:

## INSTRUCTION 1-D.

“The burden is upon the plaintiff to prove every fact at issue which is essential to his cause of action or right of recovery, and this burden rests upon him at every stage of the trial and must be shown by a preponderance of the evidence.”

page 61 }

## INSTRUCTION 2-D.

"The court instructs the jury that one of the conditions and provisions of the policy of insurance involved in this case is that the insured has become wholly disabled by bodily injuries or disease and will be permanently, continuously and wholly prevented thereby for life from engaging in any occupation or employment for wage or profit.

"If therefore you believe from the evidence in this case that the plaintiff, Joliff S. Brinkley, was not wholly disabled by reason of the accident complained of and will not be permanently, continuously and wholly prevented thereby for the period of his life from engaging in any kind of occupation or employment for wage or profit, he cannot recover and you must find for the defendant."

Thereupon, the following instruction was offered on behalf of the defendant and refused by the court:

## INSTRUCTION 3-D.

"The court instructs the jury that under the terms and conditions of the policy in question the plaintiff cannot recover without showing that he is incapacitated not only from following his usual occupation, but also from pursuing any other gainful occupation."

page 62 } Mr. Seawell: We except to the court's ruling in refusing to give Instruction No. 3-D on behalf of the defendant for the reason that under the contract in this case it is not restricted to plaintiff's usual occupation, but relates to any employment or occupation for gain or profit.

page 63 } I, B. D. White, Judge of the Circuit Court of the City of Portsmouth, Virginia, who presided over the foregoing trial of Joliff S. Brinkley v. Travelers Insurance Company, tried in the Circuit Court of the City of Portsmouth, Virginia, on September 6th, 1934, do hereby certify that the foregoing is a true copy of the record of the proceedings in said court, and that the stenographic copy and report of testimony and other incidents of the trial of said case is a true and authenticated copy thereof except plaintiff's Exhibit No. 1 and defendant's Exhibit A, the originals of which said exhibits are identified by my signature, and it is agreed by counsel for the plaintiff and counsel for the defendant that in lieu of certifying copies of said exhibits re-

ferred to as a part of the foregoing copy of record, the originals shall be transmitted by the Clerk of this court to the Clerk of the Supreme Court of Appeals.

And I further certify that the plaintiff had reasonable notice in writing of the time and place when said report of testimony and other incidents of the trial would be tendered and presented to the undersigned for certification.

Given under my hand this 5th day of October, 1934, within sixty days of the time when judgment in this case was rendered.

B. D. WHITE,  
Judge of the Circuit Court of the City of  
Portsmouth, Virginia.

page 64 } I, Kenneth A. Bain, Jr., Clerk of the Circuit  
Court of the City of Portsmouth, Virginia, do  
hereby certify that the foregoing report of the evidence and  
other incidents of the trial of the case of Joliff S. Brinkley v.  
Travelers Insurance Company, tried in the Circuit Court of  
the City of Portsmouth, Virginia, on September 6th, 1934, was  
filed and lodged with me as Clerk of the said court on the 5th  
day of October, 1934.

KENNETH A. BAIN, JR.,  
Clerk of the Circuit Court of the City of  
Portsmouth, Virginia.

page 65 } State of Virginia.  
City of Portsmouth, to-wit:

I, Kenneth A. Bain, Jr., Clerk of the Circuit Court of the  
City of Portsmouth in the State of Virginia, do hereby cer-  
tify that the foregoing is a true transcript of the record in the  
foregoing cause; and I further certify that the notice required  
by Section 6339, Code of 1919, was duly given in accordance  
with said section.

Given under my hand this 11th day of October, 1934.

KENNETH A. BAIN, JR., Clerk.  
By D. V. MAJOR, D. C.

A Copy—Teste:

M. B. WATTS C. C.

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