meaning of the act. The evidence showed he had been in the employ of the company as an engineer and brakesman for several years with some intermission; that for several months previous to the accident and down to the 4th day of September, 1861, when his train was stopped by guerrillas, he had been continually on duty as a brakesman; and that, about that time, the interruptions occasioned by actual hostilities in that neighbourhood had caused the train on which he was employed to cease running for a time; and that for several days before the day of his death he had not been on actual service on any train, but his name still remained on the roll of the company's employees as before. He had never been paid off and discharged; his account was unsettled; there were arrears still due him at the time of his decease. It appears brakesmen were paid monthly, but at the rate of so much per day for as many days as they actually worked during the month.

These facts would all go to show that his employment still continued, and that his relation to the company was still that of an employee. On the morning of the accident, he signalled the train to stop and take him up where he was; he took his place on the baggage-car among other employees; he appears to have treated himself as an employee, and was treated by the conductor as an employee who was passing from one point to another on the road in the usual manner. He engaged no passage, took no seat, in any passenger-car, paid no fare, and evidently did not expect to pay any: and none was exacted from him. He did not claim to be a passenger, nor was he treated otherwise than an employee by the conductor. Upon a careful examination of the evidence on this point, we think it tended to prove that he was an employee, and not a passenger within the purview of this act, and that under all the circumstances the conductor had a right to presume he was travelling as an employee of the company merely.

Such being the relation of the parties, the mere circumstance that he had been off duty as a brakesman for some days, or that he was then passing on his own private errand, and not immediately engaged on the business of the company or in running that very train, cannot be allowed to make any difference: *Gilshannon* v. *Stony Brook Railroad Co.*, 10 Cush. 228. The conductor knowing him only as an employee was not bound to inquire into his particular errand; and though informed by a casual conversation with him in the baggage-car, that he was looking for some temporary employment so as not to lose time: he still might be justified as treating him as an employee who had the privilege of free passage on the train as such. Under such circumstances it was his business, if he claimed to be a passenger, to engage or take a seat in the passenger coach, or at least in some way to make it known to the conductor that he claimed to be travelling in the character of a passenger.

Where a director was invited by the president to pass over the road as a passenger, without paying fare: *Philadelphia and Reading Railroad Co.* v. *Derby*, 14 How. U. S. 468; where a man was taken up by the engineer of a gravel-train, to be carried as a passenger, paying fare as the practice had been, and was allowed to go from the tender to the gravel-car: *Lawrenceburg and Upper Mississippi Railroad Co.* v. *Montgomery*, 7 Ind. 474; and where a man who had been a work-hand on the road, but had left the service of the company two weeks before the accident, because they did not pay him, got upon the train to be carried as a passenger: *Ohio and Mississippi Railroad Co.* v. *Muhlins*, 30 Ill. 9; and where a house-carpenter was employed to build a bridge, and was sent by the company on their cars to another place, to assist in loading timber for the bridge: *Gillenwater* v. *Madison and Indiana Railroad Co.*, 5 Ind. 340; the injured person was held to be clothed with all the right and character of a passenger and a stranger; and that he was not to be considered as standing on the same footing as ordinary employees and fellow-servants of the company.

If this party had been invited to go in the train as a passenger, or had taken a seat in a passenger-car, or had been taken on board the train in the character of a passenger, and the conductor had merely waived his right to demand fare as an act of liberality or courtesy, and had then allowed him to pass into the baggage-car to ride there, the case would have been quite different, and might have fallen within the reasoning and the principles of these adjudicated cases. The benefit of this act was plainly intended for those only who stand, strictly speaking, in the relation of passengers, and between whom and the carrier there exists the privity of contract, with or without fare actually paid, and the peculiar responsibilities which are implied in that relation and depend wholly upon it. Where the relation is properly that of master and servant only, this particular clause of the act has no application. We think this matter was not fairly nor correctly laid before the jury by the instructions of the court below.

Again, even if the deceased party would be considered as having been in any proper sense a passenger, there would not be the least doubt that he himself neglected all precautions and voluntarily placed himself in a position which he knew to be the most dangerous on the train for passengers. A baggage-car is certainly no place for a passenger, and as such the proof shows he had no business to be there at all. We are aware that it has been held in some cases, that if a passenger, who is travelling as such, is allowed to go into the baggage-car, or into a part of the baggage-car which is used as a post-office, where passengers are sometimes permitted to be, as in *Carrol* v. *New York and New Haven Railroad Co.*, 1 Duer 571, and while there an accident and injury occur, by reason of negligence on the part of the company, and under such circumstances that his being in that place cannot be said to have materially contributed to produce the accident or injury, the defendant would still be held liable. In many cases of this kind, it might be difficult to determine whose negligence had been the real cause of the injury.

But any question of this nature is removed from our consideration in this case, by force of another statute which finds an apt and just application here.

By the 54th section of the Act concerning Railroad Associations, Rev. Stat. 1855, p. 430, approved one day only after the act in question, it is expressly provided as follows:—