M E M O R A N D U M

(Fictitious name substituted for actual names)

October 4, 1949

L-49-549

M-130

TO: The Director of Retirement Claims

FROM: The Associate General Counsel

SUBJECT: John Allen Doe (Deceased)

Survivors' Insurance Annuities - Status in New Jersey of alleged common-law wife and of "equitably adopted" child of deceased employee. (Your submission of April 27, 1948)

John Allen Doe died domiciled in the State of New Jersey on October 20, 1947, and the question has arisen as to whether Mary Jones Doe may be deemed to be his common-law wife, and further whether John J. Doe, a minor, may qualify as his "child" within the meaning of Section 5(c) of the amended Railroad Retirement Act of 1937 by operation of an "equitable adoption" in New Jersey.

On November 6, 1947, Mary Jones Doe (hereinafter referred to as the applicant) filed an Application Form No. AA-18 for a survivor's insurance annuity for herself as the common-law wife of the deceased, and also for John J. Doe as the "child in equity" of the deceased. In support of her application she has submitted evidence showing that she began to live with the deceased in May, 1926. At that time the applicant was 14 years of age and the deceased was 19. A child was born of this relationship on September 13, 1927, and died some seven months later. The deceased failed to legalize his relationship with the applicant, and because of this failure she left him after the death of her child. On December 17, 1929, the applicant married one Fred Moore in New York City. Fred Moore deserted the applicant in 1931, and she obtained a divorce from him on March 17, 1938. A copy of the divorce decree has been adduced in this record. The applicant has stated that she went back to live with the deceased on April 1, 1938, pursuant to an agreement that they would live as husband and wife for the rest of their lives. She has alleged that the deceased gave her a wedding ring and promised that he would enter into a legal marriage with her as soon as he received his father's consent. It appears that the father of the deceased did not approve of the applicant and refused to give his consent to their marriage. The applicant has stated that she and the deceased lived openly together as husband and wife from April 1, 1938, until the date of the deceased's death; that she was publicly known as Mrs. John Allen Doe; that she had charge accounts under that name with stores in Newark and in Jersey City, New Jersey; that she was named as the wife of the deceased on a deed to a stationery store which she and

the deceased owned jointly; and that she generally was held out as the wife of the deceased to the friends and relatives of the two. In corroboration of the applicant's statements there have been here adduced two Forms No. G-124a, the first signed by Frank Doe, the father of the deceased, and the second signed by Harry Lewis Smith, a family friend. In his Form No. G-124a, Frank Doe identified himself as the "father-in-law" of the applicant, and stated that the deceased and the applicant maintained a home and lived together as husband and wife, that he and others considered them as husband and wife, and that the applicant was generally known as Mrs. Mary Doe. The statement of Harry Lewis Smith was substantially to the same effect. Further corroboration of the applicant's allegation that the deceased held her out as his wife appears in this record in the form of an Application Form No. AA-1 signed and filed by the deceased on July 1, 1947, some three and one-half months prior to his death. In this application the deceased stated that he was married, and gave his wife's maiden name as Mary Jones. On the other hand, it may be noted that a surviving brother of the deceased, George L. Doe, has filed an Application Form No. AA-21 for a Lump-Sum Death Payment in which he has stated that the deceased was not married at the time of his death. The file also contains a letter dated November 7, 1947, from the law firm of Solomon & Miller of Jersey City, New Jersey, to the effect that the deceased made a will on October 6, 1947, in which he designated himself as being unmarried. However, a copy of this will, although requested by us, has not been adduced in this record. It further appears that the marital status of the deceased was listed as "single" on the official certificate of his death.

With respect to the status of the child, John J. Doe, it appears that the boy was born out of wedlock on November 8, 1945, to Betty Smith. The applicant has alleged that the natural father of the child is one Henry Green. Betty Smith was unable to support her son, and on December 2, 1945, surrendered the boy to the care of the deceased and the applicant pursuant to an oral agreement which contemplated the adoption of the child by the deceased and the applicant. Betty Smith also executed a written statement on that date stating, "I give all the rights because I cannot take care of this child Donald Green." The applicant has stated that she and the deceased promised Betty Smith that they would consummate a legal adoption of the child, and further agreed that the child would inherit any and all of their property "just as if this child had been a natural product of themselves". On December 16, 1945, the deceased and the applicant had the child baptised as their son in St. Bridget's Church, Jersey City, New Jersey, and at that time named him John Joseph Doe. A copy of the baptismal certificate has been adduced in this record. The child was in the care of the deceased for one year and nine months prior to the month of the latter's death. During this period of time the deceased reared the child as his own son, and provided for his care, maintenance and support. However, he never instituted

any formal proceedings for the legal adoption of the boy. The applicant has explained his omission to do so as being due to his illness during the latter months of his life.

Insofar as the question of the applicant's status as a common-law wife is here concerned, it may be stated that common-law marriages contracted prior to December 1, 1939, are valid in New Jersey. See The New Jersey Statutes Annotated, Title 37, Section 1-10; also see Opinions L-45-459; L-49-380. The essentials for a valid common-law marriage in New Jersey were outlined as follows in the case of Dunn v. O'Day, 18 N.J. Misc. 679, 16 A. (2d) 195 (1940):

> "The two essentials of a common law marriage are capacity and mutual consent presently to become man and wife . . . Cohabitation with matrimonial habit or repute is evidence of marriage . . . In Costill v. Hill, 1897, 55 N.J.Eq. 479, 40 A. 32, 33, is found a succinct summary of the applicable law where it is held: 'The general rule, under proofs of the kind considered, is that where a man and woman constantly live together ostensibly as man and wife, claiming to be such, and so demeaning themselves towards each other, and are received into society, and are treated by their friends and relations, as having and being entitled to that status, the law, in favor of morality and decency, will presume that they have been legally married. Such cohabitation and repute are said to be matrimonial, in distinction from that occasional, hidden, and limited cohabitation which marks the meretricious relation.'"

In the case of Sturm v. Sturm, 111 N.J.Eq. 579, 163 A. 5, at p. 9 (1932), the court used the following language which appears to be applicable here:

> "In New Jersey no formal ceremony is essential to a valid marriage, and an agreement between the parties per verba de praesenti to be husband and wife constitutes a valid marriage. . .
>
> ". . . Even if the contract had not been per verba de praesenti, the marriage would have been validated by subsequent cohabitation and birth of issue, by the subsequent acts of the defendant in recognition of the status . . ."

Upon analysis of the foregoing language, and upon review of the evidence adduced in this matter, it is my opinion that although certain

of the statements submitted here appear to be in conflict, nevertheless the weight of evidence in this case substantially supports the finding that the deceased and the applicant entered into an agreement on April 1, 1938, to live together as husband and wife for the rest of their lives, and that the common-law marriage thus contracted was validated by their subsequent open matrimonial cohabitation. Due regard has been here given to the assertions that the deceased was unmarried at the time of his death, as evidenced by the statements of George L. Doe and the law firm of Solomon & Miller, and by the information set forth in the deceased's death certificate. However, it may be noted that the interest of George L. Doe in this case is adverse to that of the applicant. The information set forth in the death certificate was furnished by Samuel Doe, a second brother of the deceased, who evidently did not regard the applicant's status as being legalized. A copy of the will in which the deceased allegedly described himself as being single has not yet been submitted to the Board, although this office has previously requested George L. Doe for such copy and for information relating to formal probate proceedings. Under these circumstances, and in view of the deceased's written statement that he was married to the applicant, and further in view of Frank Doe's statement that he was the applicant's "father-in-law", and considered her to be the wife of the deceased, it is my conclusion that the applicant may be deemed to be the common-law wife of the deceased.

Inasmuch as we have here found that the deceased and the applicant entered into a valid common-law marriage on April 1, 1938, it is not necessary at this time to ascertain whether their first period of cohabitation from May, 1926 to December, 1929, constituted a common-law marriage. It may be observed that their immaturity was such during this first period as to render their conduct and separation inconclusive as to their marital intentions a decade later.

With reference to the question of the "equitable adoption" of John J. Doe by the deceased, you have been previously advised that the doctrine of "equitable adoption" is recognized in New Jersey, and that the existence of an enforceable adoption contract is a necessary prerequisite for the establishment of an "equitable adoption" in that jurisdiction. See Opinion L-49-119, and the New Jersey decisions cited therein. The evidence adduced in this case satisfactorily shows that such an enforceable adoption contract was negotiated between the deceased and the applicant and the natural mother of John J. Doe on or about December 2, 1945. This contract was substantially executed by the parties thereto in all respects other than the consummation of the legal adoption of John J. Doe by the deceased. Examination of the New Jersey adoption procedure as set forth in The New Jersey Statutes Annotated, Title 9, Subtitle 2, Chapter 3, leads me to conclude that had the deceased instituted formal adoption proceedings with diligence and promptness he could have consummated a legal adoption of John J. Doe more than twelve months prior to the month in which he died.

Consideration has been given to the question of whether the adoption contract here involved was rendered unenforceable by reason of the fact that the deceased and the applicant were never joined by a ceremonial marriage. In this connection it may be noted that the statutory adoption procedure of New Jersey is not limited to adoptive parents who have been ceremonially joined in marriage, but that this procedure is available to "any unmarried person of full age", to "a husband with his wife's consent", and to "a wife with her husband's consent". See The New Jersey statutes Annotated, Title 9, Subtitle 2, Section 9:3-1. It is essential, however, that the adoptive parent or parents maintain a home suitable for the proper rearing of the child, and that such parent or parents be of good moral character and of reputable standing in the community. See The New Jersey Statutes Annotated, supra, Sections 9:3-6, and 9:3-7. The very question here presented was discussed in some detail in Opinion L-49-291 which involved an "equitable adoption" in South Carolina, and it was there held that an adoption contract would not be rendered unenforceable because the adoptive parents were joined by a common-law rather than by a ceremonial marriage. Reference was there made to the case of Savannah Bank & Trust Co. v. Wolff, 191 Ga. 111, 11 S.E. (2d) 766 (1940), in which the Supreme Court of Georgia held that the virtual or "equitable adoption" of a child would be recognized where the child had been surrendered by her natural mother to the custody of the adoptive father and his common-law wife pursuant to an oral agreement whereby the adoptive father promised to adopt the child and leave her one-half of his estate. The Georgia adoption code applicable in the above-cited case is worded as follows:

> "No person may adopt a child, so as to render it capable of inheriting his estate, unless such person is (1) at least 25 years of age, or (2) married and living with husband or wife. The petitioner must be at least 10 years older than the child, a resident of this State, and financially able and morally fit to have the care of the child . . ." Code of Georgia Annotated, Book 22, Chapter 74-4, §§ 74-401 (3016) (Underscoring supplied)

In view of the substantial similarity in the concepts of the New Jersey and the Georgia adoption codes, it appears reasonable to conclude that the precedent of Savannah Bank & Trust Co. v. Wolff, supra, may be considered applicable in the instant matter, inasmuch as research by this office has uncovered no reported New Jersey case bearing specifically on this point.

The foregoing discussion leads me to conclude that the adoption contract negotiated between the deceased and the natural

mother of John J. Doe was an enforceable one, and accordingly that the failure of the deceased to consummate a legal adoption of the boy constituted such a breach of contract as would warrant equitable relief in the courts of the State of New Jersey. It follows therefore that an "equitable adoption" of the boy by the deceased is here established. This "equitable adoption" clearly came into being more than twelve months prior to the month in which the deceased died, and hence satisfies those requirements of Section 209(k) of the Social Security Act which are incorporated by reference into Section 5(l)(1) of the amended Railroad Retirement Act of 1937. John J. Doe may therefore qualify as the "child" of the deceased, John Allen Doe, within the meaning of subsections (c) and (l)(1) of Section 5 of such Act.

David B. Schreiber
Associate General Counsel