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BILL OF COMPLAINT.

(Filed Sept. 27, 1927.)

IN CHANCERY OF NEW JERSEY.

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey:

Alice O. Howard and J. Edgar Howard, complainants, residing in Haddonfield, New Jersey, respectfully show as follows:

1. On or about February 11, 1925, complainant, Alice O. Howard, while standing in Haddonfield, New Jersey, near the intersection of Kings Highway east with the railroad tracks of defendant, West Jersey and Seashore Railroad Company, was injured by a brakeshoe or some other piece of machinery, appliance or equipment flying from one of the cars or engine or tender of a passing train of one of the defendant railroad companies. The complainant was carried home in a semi-conscious condition as a result of the injuries sustained and was confined to her bed thereafter for a period of some thirteen weeks and for a long time after that was and still is a semi-invalid suffering from marked nervous disorders. Complainant's injuries are of a permanent nature and will probably leave her a semi-invalid for the rest of her life.

2. On August 26, 1927, complainant, together with her husband, the complainant, J. Edgar Howard, brought suit in the New Jersey Supreme Court to recover damages from the defendant railroad com-

panies, alleging in the complaint filed in said suits that the said railroad companies, or one of them, was negligent in the maintenance and/or operation of the car, engine or tender from which the brake-shoe or other appliance which struck the first named complainant was dislodged. The defendant railroad companies have filed an answer in said cause in which they have set up *inter alia* the defense of the statute of limitations in this State barring actions for personal injuries unless the same are brought within two years after the accrual of the cause of action.

3. Complainants charge that the attempt on the part of the defendant railroad companies to avail themselves of the said defense is, under the circumstances (hereinafter fully set forth), unjust and unequitable; that complainants were misled and induced by the acts and declarations of the agents of the defendant companies into refraining from prosecuting their said suit at law within the prescribed period of two years; and that the attempted assertion of such defense in the present suit at law amounts to a fraud upon complainants against which there is no remedy in the courts at law, but only in this court. The circumstances affecting the right of the defendant railroad companies to plead the statute of limitations are as follows:

4. A few days following the injuries to the complainant, Alice O. Howard (hereinafter called Mrs. Howard), one Mr. McDonald, a representative of the claims department of the defendant railroad companies, came to the complainants' home and saw the complainant, J. Edgar Howard (hereinafter called Dr. Howard). He stated that he had come to

inquire as to the extent of Mrs. Howard's injuries. Dr. Howard thereupon advised him as fully as he could at the time thereon and suggested that the railroads send their own physician to examine Mrs. Howard. Mr. McDonald said that this was not necessary; that Dr. Howard should do everything possible for her and he would keep in touch with them and see if they could not adjust the matter. Thereafter he came repeatedly to complainants' home and also called on the telephone, on each occasion asking as to Mrs. Howard's condition and on several of these occasions said to Dr. Howard in substance that he should do nothing about the matter and that when Mrs. Howard was ready he felt sure that they could arrive at some amicable settlement. These personal visits from Mr. McDonald to complainants' home occurred at least once every two weeks for a period of more than six months after Mrs. Howard's injuries were sustained. Thereafter he continued to get in touch with complainants and either called at their home or on the telephone, about once each month for a period of over a year.

5. During all of this time Mrs. Howard's condition was so uncertain that complainants were not justified in discussing the matter of a pecuniary settlement with the railroad. Several specialists had been called in, among them Dr. Lavinia Clement, Dr. Lloyd E. Strohm, Dr. P. Brook Bland, Dr. Alfred Gordon and Dr. Philip Peltz. Doctors Clement and Strohm were in constant attendance upon Mrs. Howard during all of the time hereinabove mentioned.

6. In the late fall of 1926, or possibly in the early part of December of that year, feeling that Mrs.

Howard's condition had sufficiently defined itself to justify a discussion of settlement with the defendant railroad companies, and desiring to take the matter up with the head of the claims department of said companies, the complainants notified the head of that department, Mr. A. P. Turnbull, that they would like to discuss the matter with him personally. A few days thereafter the said Mr. Turnbull came to complainants' home and went over in detail with Dr. Howard the physical condition of Mrs. Howard. The said Mr. Turnbull inquired of Dr. Howard the terms upon which he was willing to settle the complainants' claim and was advised that he and Mrs. Howard would accept the sum of ten thousand dollars ($10,000) in full settlement. To this Mr. Turnbull replied by asking if Dr. Howard had any objection if he (Mr. Turnbull) personally saw all of the different doctors who had been in attendance on Mrs. Howard. To this Dr. Howard replied that he had certainly no objection. Mr. Turnbull then said that it would take considerable time for him to go into it but that he would make such investigation and then get in touch with Dr. Howard.

7. On Thursday afternoon, February 10, 1927, said Mr. Turnbull called Dr. Howard on the telephone at his home in Haddonfield and stated that after considerable difficulty in getting in touch with the several physicians he had gone into the matter with them, but was only prepared to offer on behalf of the railroad companies one-quarter of the sum originally demanded by complainants, or the sum of $2500.00 in settlement of complainants' claims. To this Dr. Howard replied that he did not think this would be satisfactory but he would like to discuss

it with Mrs. Howard. Whereupon Mr. Turnbull replied, "Allright, you talk the matter over and let me hear from you."

8. Thereafter and during the next few days the complainants discussed the railroad companies' offer and, in view of Mrs. Howard's delicate health and her reluctance to appear in court, decided to accept the said offer of the defendant railroad companies, and on Saturday morning, February 19, 1927, Dr. Howard, with the express approval of his wife, went to Mr. Turnbull's office. Mr. Turnbull, however, was out of his office and Dr. Howard was advised that he could not see him until the following week. Thereupon on Monday of the following week Dr. Howard returned to Mr. Turnbull's office and was again advised that the latter was out. The 22nd of February was a holiday and on the 24th Dr. Howard returned to Mr. Turnbull's office and saw him and told him he was prepared to discuss the railroad companies' offer of $2500.00. Thereupon he was told by Mr. Turnbull that any claim by him or his wife was barred by the New Jersey Statute of Limitations and that the railroad companies would pay him nothing. Upon Dr. Howard's pointing out the unfairness of raising such defense when an actual offer of settlement by the railroad companies was being considered by the complainants, he was informed by Mr. Turnbull that he would take the matter up again with the officers of the railroad companies and see what could be done. Relying upon this promise complainants postponed any further action until they had heard from the railroad companies. Not having so heard, complainants on March 15, 1927, addressed a letter to Mr. Turnbull asking him to advise what the railroad

companies were prepared to do. To this he received the following answer:

"April 18, 1927.

My dear Doctor Howard:

Referring to your letter of March 15th, the subject matter at the present time is in exactly the same position as it was when you called at this office recently.

Yours truly,

(signed) A. P. Turnbull
District Claim Agent."

9. Not understanding what Mr. Turnbull intended to convey by this reply, Dr. Howard addressed a letter to one of the vice-presidents of the Pennsylvania Railroad Company at Broad Street Station, Philadelphia, in which he set forth the facts in his case and asked for definite advice as to what the defendant companies proposed to do. No direct reply was written to this letter but negotiations were taken up directly with said vice-president through the medium of a personal friend who conferred from time to time with the said vice-president in regard to the said claims of complainants.

10. About the middle of July, 1927, the railroad companies advised complainants, through the said mutual friend, that they would not consider paying complainants anything on account of their said claims in view of their contention that they were entitled to take advantage of the statute of limitations of this State. Complainants thereupon brought the suit in the New Jersey Supreme Court hereinabove referred to.

11. At no time during the two-year period following Mrs. Howard's injuries had either of complain-

ants any knowledge of the provisions of the Statute of Limitations of this State or any understanding that any suit at law by them to enforce a claim of damages for said injuries must be started within two years after the cause of action accrued. In view of the repeated assurance of Messrs. McDonald and Turnbull that the railroad companies were prepared to recognize their liability and pay damages if the amount thereof could be agreed on, complainants refrained from retaining counsel and proceeded throughout the entire two-year period without the benefit of legal advice. In the telephone conversation had by Dr. Howard with Mr. Turnbull on February 10th (as hereinabove set forth) complainants were led to definitely understand that they were free to consider the railroads' offer of $2500.00 and after consideration thereof to accept the said offer. It was with this very explicit understanding that the complainants proceeded to consider the offer and after a few days to accept the same.

12. Complainants are without adequate remedy at law and unless the defendants are enjoined by this equitable court from prosecuting the said defense of the Statute of Limitations they will be defeated in the said suit at law and no other remedy for the assertion of their said rights against the defendant railroad companies will be open to them, wherefore complainants pray:

1. That defendant and each of them answer this bill of complaint and each statement therein made.

2. That the defendants and each of them be enjoined from prosecuting the said defense of the Statute of Limitations against the cause of action

asserted by complainants and each of them in the aforesaid suit at law brought by them and now pending in the New Jersey Supreme Court; that a preliminary injunction to such effect issue against the said defendants and each of them enjoining them from prosecuting the said defense or in any way availing themselves thereof during the pendency of this cause.

3. That a writ of subpoena may issue, commanding said defendants to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

LOUIS B. LEDUC,
Solicitor of Complainants and of Counsel with Complainants.

ANSWER.

(Filed Oct. 7, 1927.)

IN CHANCERY OF NEW JERSEY.

Between
ALICE O. HOWARD and
J. EDGAR HOWARD,
Complainants,
and
WEST JERSEY & SEASHORE RAILROAD COMPANY and PENNSYLVANIA RAILROAD COMPANY,
Defendants.

On Bill, etc.
Answer.

The joint and several answer of the defendants, West Jersey and Seashore Railroad Company, a corporation of the State of New Jersey, and Pennsylvania Railroad Company, a corporation of the State of Pennsylvania, to the bill of complaint filed herein:

1. Defendants deny paragraph 1 excepting as herein admitted. Defendants believe it to be true that the complainant, Alice O. Howard, received some injury while standing at or near the railroad crossing as alleged in said paragraph. It is denied that said injuries were in any wise due to the fault or neglect of defendants or either of them.

2. Defendants admit paragraph 2.

3. Defendants deny the matters and things contained in paragraph 3.

4. Defendants' answer to paragraph 4 is contained in paragraph 6 hereof.

5. Defendants answer to paragraph 5 is contained in paragraph 6 hereof.

6. Defendants, answering paragraphs 4, 5 and 6, admit it to be true that one of the representatives of the claim department of said defendants called on J. Edgar Howard at his house for the purpose of inquiring as to how Alice O. Howard was progressing and discussions were had from time to time between the representatives of the claim department and J. Edgar Howard with respect to propositions of settlement. At no time, however, was J. Edgar Howard asked or induced in any way whatsoever to refrain from bringing suit on the claim of himself and his wife. The matter was negotiated with him in the same manner as all other propositions of settlement are negotiated with claimants.

On February 15, 1926, the claim department of the defendants got in touch with J. Edgar Howard by telephone and was advised by J. Edgar Howard that he, J. Edgar Howard would notify the said department when he, J. Edgar Howard desired to talk concerning the matter. On October 13, 1926, the head of the claim department of defendants, Arthur P. Turnbull, by appointment, called at the house of J. Edgar Howard, and was there advised that the complainants desired $10,000 in settlement of their claim. The names of a number of physicians, who had attended Alice O. Howard were given

Arthur P. Turnbull, and he, Turnbull, was given permission to interview these doctors.

However, neither at that time nor at any other time from the time of the said accident until the expiration of the two years' period was anything said by anyone, either misleading or, otherwise, to deter the complainants, or either of them from bringing suit, if they so desired.

Further answering said paragraphs 4, 5 and 6, defendants say that on or about February 1, 1927, they authorized the claim department to pay $2500 in settlement of the case, not in recognition of any liability but for the purpose of disposing thereof, provided, however, that said settlement would be approved by their district solicitors. On that day, the mater was taken up with the district solicitors and they requested the claim department to make some further investigation concerning certain details of the case. The result of this further investigation was reported to the solicitors on February 5, 1927. It was their opinion that there was no liability, but that in view of the authorization, it might be good policy to settle the case for the sum authorized. On February 9, 1927, Arthur P. Turnbull, head of the claim department of the said defendants, advised the complainants that the best the defendants could do would be to pay $2500, and so far as the defendants were concerned, that was the end of the matter. To this, J. Edgar Howard, one of the defendants, replied that that would not be satisfactory and that he would have to take further action.

7. Defendants deny the matters and things alleged in paragraph 7.

8. Defendants, answering paragraph 8, admit that on February 24, complainant, J. Edgar Howard,

called at the office of the claim department of defendants. They deny that any proposition was made to accept $2500 that had been offered on February 9th previous.

9. Defendants admit paragraph 9.

10. Defendants admit paragraph 10.

11. Defendants deny paragraph 11.

13. Further answering said bill of complaint, defendants say that none of the matters and things alleged in said bill are sufficient in law or equity to justify or warrant this Court from enjoining the defendants from pleading the statute of limitations in this cause, and the defendants pray the same benefit of this defense as completely and fully as though they had moved to strike out complainants' bill for want of equity.

Defendant prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

BOURGEOIS & COULOMB,
Solicitors for and of Counsel with Defendants.

REPLY.

(Filed Oct. 18, 1927.)

IN CHANCERY OF NEW JERSEY.

Between
ALICE O. HOWARD and
J. EDGAR HOWARD,
Complainants,
and
WEST JERSEY & SEASHORE RAILROAD COMPANY and PENNSYLVANIA RAILROAD COMPANY,
Defendants.

On Bill, etc.
Reply.

Complainants deny all the allegations of the defendants' answer in the above cause.

LOUIS B. LEDUC,
Solicitor of Complainants.

ORDER OF REFERENCE.

(Filed Oct. 25, 1927.)

IN CHANCERY OF NEW JERSEY.

Between ALICE O. HOWARD and J. EDGAR HOWARD, *Complainants,* and WEST JERSEY & SEASHORE RAILROAD COMPANY and PENNSYLVANIA RAILROAD COMPANY, *Defendants.*		On Bill, etc. Order of Reference.

This matter being opened to the Court by Louis B. LeDuc, solicitor for complainants, and upon the consent of counsel for defendants hereunder written:

It is, on this day of October, A. D. 1927, ordered that the above caused cause be referred to Hon. Edmund B. Leaming, to hear the same for the Chancellor and to report thereon to him and advise what order or decree should be made therein.

We consent to the making of the above order.

BOURGEOIS & COULOMB,
Solicitors of Defendants.

BILL FOR INJUNCTION.

(Filed May 10, 1928.)

IN CHANCERY OF NEW JERSEY.

Between ALICE O. HOWARD and J. EDGAR HOWARD, *Complainants,* and WEST JERSEY & SEASHORE RAILROAD COMPANY and PENNSYLVANIA RAIL- ROAD COMPANY, *Defendants.*	Final Hearing. Bill for Injunction.

Complainants, husband and wife, have brought an action at law against defendants to recover damages for physical injuries alleged to have been sustained by Mrs. Howard through the negligent operation of defendants' railway. By the present suit in this court complainants seek an injunction to restrain defendants from interposing a defense of the statute of limitation in the law court. The relief sought is based upon the claim that the failure of complainants to sue for damages within the statutory period of two years was caused by the conduct of defendants.

The testimony submitted at final hearing in this court cannot be said to be in material conflict or the

facts in doubt except as to a certain telephone conversation which occurred on February 9th or 10th, 1927—one or two days before the statutory period for suit expired. The facts antedating that telephone conversation are substantially as follows: The casualty occurred February 11th, 1925. One MacDonald, as claims investigator of defendants, called at the home of complainants within a day or two thereafter and interviewed Dr. Howard, husband of complainant, Mrs. Howard, touching the condition of his wife, and continued making like calls on Dr. Howard from time to time—latterly at times using the telephone instead of making personal calls—for a period extending to October, 1926. During all of that time the uniform attitude of Mr. MacDonald was that of sympathetic concern touching Mrs. Howard's injuries and sufferings, and during all of that period both Mr. MacDonald and Dr. Howard appear to have assumed and to have given mutual expression to the view that an amicable settlement could be made when the extent of Mrs. Howard's injuries could be definitely ascertained, and that it would be unnecessary for complainants to employ an attorney, but that any consideration of the amount to be paid by defendants could not be intelligently had until it could be ascertained with greater certainty whether Mrs. Howard's injuries were permanent.

In October, 1926, Dr. Howard and Mr. MacDonald determined that Mrs. Howard's condition was sufficiently defined to justify a consideration of the terms of settlement and Mr. Turnbull, as the superior officer of defendants' district claims department, was notified to that effect; accordingly Mr. Turnbull called on Dr. Howard for the purpose named October 13, 1926. At that interview Mr. Turnbull asked Dr. Howard to state the amount that

would be accepted in settlement and Dr. Howard named ten thousand dollars. No reply was made by Mr. Turnbull touching the reasonableness of that amount; he then inquired whether he might interview the six physicians who had treated Mrs. Howard and received Dr. Howard's permission to do so. It was then arranged that Mr. Turnbull would see the several physicians, or cause them to be interviewed, and take up the matter with defendants and apprise Dr. Howard of the result. From that date until February 9th or 10th, 1927, Dr. Howard confidently awaited a reply from Mr. Turnbull touching the amount defendants would pay. On February 9th or 10th, 1927—Mr. Turnbull says positively February 9th; Dr. Howard thinks it may have been February 10th, Mr. Turnbull called Dr. Howard on the telephone and stated to him that defendants would pay in settlement twenty-five hundred dollars, but would not pay more. The statutory period for suits on claims of that nature is two years and in consequence expired February 11th, 1927. At the time of that telephone conversation Mr. Turnbull admittedly knew that the two years limitation would expire February 11th, since he had shortly theretofore discussed that fact with the solicitor of defendants. Dr. Howard did not know of the two years' period of limitation.

The only dispute touching the substance of the telephone conversation of February 9th or 10th is that Mr. Turnbull says that he named twenty-five hundred dollars as an ultimatum and that Dr. Howard definitely and finally refused to accept that amount and stated that he would "take other means;" Dr. Howard says that his reply was that he did not think Mrs. Howard would accept that amount, but that he would submit the offer to her and apprise Mr. Turnbull of her determination.

There can be no doubt from the evidence that Dr. Howard fully understood during the entire statutory period that the liability of defendants for damages would not be contested, nor can it be doubted that his belief in that respect was caused by the attitude of the representatives of defendants and that his failure to employ an attorney prior to the expiration of the statutory period was due to that belief. It is also reasonably clear that both of the representatives of defendants already referred to knew or had reason to believe that Dr. Howard had no attorney. It is also certain that Dr. Howard did not know of any limited period within which suit should be brought until after the expiration of that period. The evidence also establishes that during the period between the casualty and October, 1926, Dr. Howard and Mr. MacDonald concurred in the view that the amount of damages could not be adequately considered until Mrs. Howard's condition should become more clearly defined, and that from October 13, 1926, until February 9th or 10th, 1927, Dr. Howard's inactivity was the result of the engagement of Mr. Turnbull to apprise him of what amount defendants would pay.

Subsequent to the expiration of the statutory period Dr. Howard apprised Mr. Turnbull that the offer of twenty-five hundred dollars in settlement was accepted, but was informed that he was too late.

Louis B. LeDuc, Esq., for complainants.

Messrs. Bourgeois & Coulomb, for whom appeared Geo. M. Shipman, Esq., for defendants.

LEAMING, V. C.:

I am convinced that in the circumstances of this case defendants cannot be privileged to interpose the statute of limitations as a defense to complainants' pending action at law for damages.

It seems clear that if defendants' wrongful conduct can be said to have caused complainants to subject their claim to the bar of the statute of limitations, a court of equity should not permit them to hold the advantage thus obtained.

It must be recognized that the statute of limitations is for the benefit of individuals and not to secure general objects of policy; hence it may be waived by express contract or by necessary implication, or its benefits may be lost by conduct invoking the established principles of *estoppel in pais.* Freeman v. Conover, 95 N. J. Eq. 89. Also it should be noted that while the doctrine of *estoppel in pais* rests upon the ground of fraud, it is not essential that the representations or conduct giving rise to its application should be fraudulent in the strictly legal significance of that term, or with intent to mislead or deceive; the test appears to be whether in all the circumstances of the case conscience and duty of honest dealing should deny one the right to repudiate the consequences of his representations or conduct; whether the author of a proximate cause may justly repudiate its natural and reasonably anticipated effect; fraud, in the sense of a court of equity, properly including all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another. 1 Story Eq. Juris. Sec. 187. The authorities in this State to the general effect stated are Lamb v. Martin, 43 N. J. Eq. 34, 37; Martin v. State Insurance

Co., 44 N. J. Law, 486, 487; Halloway v. Appligate, 55 N. J. Eq. 583, 585; Clark v. Augustine, 62 N. J. Eq. 689, 695; Freeman v. Conover, 95 N. J. Eq. 89, 93. See also Magner v. Mut. Life Ass'n., 44 N. Y. Supp. 862, aff. 162 N. Y. 657; Thompson v. The Phoenix Ins. Co., 136 U. S. 287, 300.

In the present case it seems clear that from the date of the casualty (Feb. 11th, 1925) until October, 1926, the attitude of defendants' representative was not only calculated to induce Dr. Howard, as representative of his wife, to believe, but did in fact induce him to believe, that no question was to be raised touching defendants' responsibility for the casualty, and that the amount to be paid as damages could best be determined by awaiting the course of Mrs. Howard's recovery, and that, in consequence, no necessity existed for her to employ an attorney; and it is equally clear that from October, 1926, until either two days or one day before the expiration of the statutory period for suit, Dr. Howard, in the same trustful attitude as theretofore, awaited the promised report of Mr. Turnbull as to what amount defendants would pay; and during all of the two years' period Dr. Howard was unquestionably ignorant of the existence of the statute of limitations. During the period from October 13th, 1926, to February 9th or 10th, 1927, the inactivity of complainants may be said to have been wholly occasioned by Mr. Turnbull in his failure to apprise Dr. Howard pursuant to Mr. Turnbull's engagement, of the amount defendants would pay.

If, in these circumstances, the telephone conversation of February 9th or 10th, was, as narrated by Dr. Howard, to the effect that Dr. Howard was to submit the offer of Mr. Turnbull to his wife and subsequently apprise Mr. Turnbull of his determination—Mr. Turnbull admittedly knowing that the

statutory bar would arise February 11th, and either knowing or having what appears to have been good reason to believe that Dr. Howard was probably ignorant of that fact—it seems impossible to escape the conclusion that in the circumstances Mr. Turnbull owed to Dr. Howard a duty in connection with that offer to apprise him of the fact that the offer could only be considered open at most two days because of the existence of the statute, since a reply from Dr. Howard within the two days could not have been reasonably anticipated by Mr. Turnbull without some suggestion of that nature; the natural and reasonably anticipated effect of such an offer at that late time, without the suggestion of limitation of time for the proposed reply, was to cause Dr. Howard to subject his claim to the bar of the statute.

But even assuming the telephone conversation to have been as narrated by Mr. Turnbull I am impressed that in the circumstances already narrated it was unreasonable, unjust, unfair and unconscientious for Mr. Turnbull to delay his promised report from the preceding October until at most two days before the expiration of the statutory period, knowing that Dr. Howard had been awaiting a reply from him during all that time, and then precipitously declare his offer an ultimatum, without at least apprising Dr. Howard of the fact, then admittedly in Mr. Turnbull's mind, that only two days remained for suit. The effect of his conduct was to subject complainants' claim to the bar of the statute, and that effect, in the circumstances stated, appears to have been the natural and probable effect reasonably within the contemplation of Mr. Turnbull.

While it cannot be said to be ordinarily any part of duty to apprise an adversary of his rights, it must be recognized that one cannot justly or equit-

ably lull his adversary into a false sense of security and thereby cause his adversary to subject his claim to the bar of the statute and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought. This is recognized by our Federal Supreme Court as a rule of justice in the concluding sentence of the opinion of the Court in Thompson v. The Phoenix Insurance Company, *supra,* and is made the basis of decision in Magner v. Mutual Life Ass'n., *supra.*

Any suggestion of want of authority of Mr. MacDonald and Mr. Turnbull to bind defendants by their conduct is untenable. Admittedly both were acting within the field of their employment. Defendants cannot avail themselves of the fruits of their activities and at the same time escape responsibility for the methods employed by them.

An injunction will be advised pursuant to the prayer of the bill.

Submitted: April 24, 1928.
Determined: April 27th, 1928.

FINAL DECREE.

(Filed May 21, 1928.)

IN CHANCERY OF NEW JERSEY.

Between ALICE O. HOWARD and J. EDGAR HOWARD, *Complainants,* and WEST JERSEY & SEASHORE RAILROAD COMPANY and PENNSYLVANIA RAIL- ROAD COMPANY, *Defendants.*	On Bill, etc. Final Decree.

This cause coming on to be heard in the presence of Louis B. LeDuc, Esquire, solicitor of the complainants, and of George M. Shipman, Jr., Esquire, of counsel with Messrs. Bourgeois & Coulomb, solicitors of defendants, and the Court having examined the pleadings and having taken proofs orally and in open court and heard and considered the arguments of counsel thereon.

And it appearing to the satisfaction of the Court that the defendant companies have pleaded the statute of limitations in bar of the suit at law of the complainants for damages resulting from the injury to the complainant, Alice O. Howard, alleged to have

been caused by the negligence of defendants; and that the failure of the complainants to bring their said suit at law within the period prescribed by statute was induced by the conduct and representations of the agents of the defendant companies; and that in view thereof it would be inequitable and unjust to allow the defendant companies to assert or maintain the said defense of the statute of limitations in the aforesaid suit at law, and that they are estopped in equity from so asserting such defense.

It is, on this 21st day of May, 1928, ordered, adjudged and decreed that the defendants, West Jersey & Seashore Railroad Company and Pennsylvania Railroad Company, their agents, servants and attorneys, and each and every one of them, be, and they are, hereby enjoined and commanded henceforth and forever to desist and refrain from asserting and maintaining in any form whatsoever the said defense of the statute of limitations in the said suit at law brought by the said Alice O. Howard and J. Edgar Howard in the New Jersey Supreme Court against the said defendants.

It is further ordered that the said defendant companies pay to complainants the costs of this suit to be taxed, together.

E. R. Walker,
C.

Respectfully advised:
E. B. Leaming,
V. C.

A true copy.
Thomas Barber,
Clerk.

NOTICE OF APPEAL.

(Filed May 24, 1928.)

IN CHANCERY OF NEW JERSEY.

Between

ALICE O. HOWARD and
J. EDGAR HOWARD,
Complainants,
and
WEST JERSEY & SEASHORE RAILROAD COMPANY and PENNSYLVANIA RAILROAD COMPANY,
Defendants.

On Bill, etc.
Notice of Appeal.

The defendants, West Jersey and Seashore Railroad Company and Pennsylvania Railroad Company, hereby appeal from the final decree made in the above-entitled cause on May 21st, 1928, and from the whole and every part thereof, to the Court of Errors and Appeals, in the last resort in all causes.

BOURGEOIS & COULOMB,
Solicitors for and of Counsel with Defendants.

Dated May 21, 1928.

I conceive there is good cause for appeal in the above-entitled cause.

H. R. COULOMB,
Of Counsel with Defendants.

[ENDORSED]

Service of the within notice of appeal is hereby acknowledged this 21st day of May, A. D. 1928.

Louis B. LeDuc,
Solr. of Complainants.

PETITION OF APPEAL.

(Filed May 26, 1928.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

ALICE O. HOWARD and J. EDGAR HOWARD,
Complainants-Respondents,
v.
WEST JERSEY & SEASHORE RAILROAD COMPANY and PENNSYLVANIA RAILROAD COMPANY,
Defendants-Appellants.

On Appeal from Court of Chancery. Petition of Appeal.

To the Honorable, the New Jersey Court of Errors and Appeals, in the last resort in all causes:

The petition of West Jersey & Seashore Railroad Company and Pennsylvania Railroad Company, the

appellants in the above-entitled cause, respectfully shows that:

1. Petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date May 21st, 1928, in a certain cause in the said Court of Chancery wherein the said Alice O. Howard and J. Edgar Howard were complainants and the said West Jersey & Seashore Railroad Company and Pennsylvania Railroad Company were defendants in this respect, to wit: that the said decree adjudges that the defendants, West Jersey & Seashore Railroad Company and Pennsylvania Railroad Company, their agents, servants and attorneys, and each and every one of them, be enjoined and commanded henceforth and forever to desist and refrain from asserting and maintaining in any form whatsoever the said defense of the statute of limitations in a certain action at law instituted by the said Alice O. Howard and J. Edgar Howard against the West Jersey & Seashore Railroad Company and Pennsylvania Railroad Company in the New Jersey Supreme Court.

2. And your petitioners appeal from the decree of the Court of Chancery, which decrees as aforesaid, upon the ground that the same is erroneous in that the said decree adjudges that the West Jersey & Seashore Railroad Company and Pennsylvania Railroad Company, their agents, servants and attorneys, and each and every one of them, be enjoined and commanded henceforth and forever to desist and refrain from asserting and maintaining in any form whatsoever the said defense of the statute of limitations in the said suit at law brought

by the said Alice O. Howard and J. Edgar Howard in the New Jersey Supreme Court against the said defendants; whereas the said decree should have adjudged that the bill of complaint filed herein be dismissed.

Petitioners, therefore, pray that the said decree of the said Chancellor may be wholly reversed, set aside and for nothing holden.

And that your petitioners may have such other relief in the premises as to this Honorable Court shall seem proper.

BOURGEOIS & COULOMB,
Solicitors for and of Counsel with Appellants.

[ENDORSED]

Service of a copy of the within petition of appeal is hereby acknowledged this 23rd day of May, 1928.

Louis B. LeDuc,
Atty. for Respondents.

ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ALICE O. HOWARD and J. EDGAR HOWARD,
Complainants-Appellees,
v.
WEST JERSEY & SEASHORE RAILROAD COMPANY and PENNSYLVANIA RAILROAD COMPANY,
Defendants-Appellants.

On Appeal from Court of Chancery.
Answer to Petition of Appeal.

The answer of Alice O. Howard and J. Edgar Howard, the above named complainants-appellees, to the petition of appeal of West Jersey & Seashore Railroad Company and Pennsylvania Railroad Company, the above named defendants-appellants.

These appellees, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admit that a decree was on May 21, 1928, made and entered in the Court of Chancery of New Jersey, in the above entitled cause, for the purpose in said petition mentioned and as therein set forth; but as to the substance and form of said decree, these ap-

pellees beg leave to refer thereto when the same shall be produced.

These appellees are advised and believe that the said decree is agreeable to equity; and they pray that the same may be affirmed with costs to be taxed in favor of these appellees.

LOUIS B. LEDUC,
Of Counsel with Complainants-Appellees.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

Between
ALICE O. HOWARD and
J. EDGAR HOWARD,
Complainants,
and
WEST JERSEY & SEASHORE
RAILROAD COMPANY and
PENNSYLVANIA RAILROAD COMPANY,
Defendants.

On Bill, etc.

LEAMING, V. C.

April 17, 1928.

APPEARANCES:
LOUIS B. LEDUC, ESQ., for complainants.
BOURGEOIS & COULOMB, ESQS., GEORGE M. SHIPMAN, ESQ., for defendants.

Mr. LeDuc: Has your Honor had the opportunity to go over the pleadings?

The Court: Yes, the bill, I believe, claims that the defendant led the complainant to the brink and then shoved him over.

Mr. LeDuc: Or let him fall without shoving; so close to the brink that his own movements carried him over.

Dr. John Edgar Howard, sworn.

By Mr. LeDuc:

Q. You are one of the complainants in this case, are you, Doctor?

A. Yes, sir.

Q. Where do you live?

A. 67 Kings Highway West, Haddonfield.

Q. You have your doctor's office in your home?

A. I do have.

Q. You are a graduate of what school of medicine?

A. Jefferson Medical College.

Q. And you have been practicing for how long?

A. Over 25 years.

Q. Now, you recall an accident which your wife suffered at the crossing—the Kings Highway crossing of the West Jersey and Seashore Railroad, on February 11, 1925?

A. Yes, sir.

Q. After that accident, your wife, I believe, was laid up for a long time, is that correct?

A. Yes, sir, she spent 13 weeks in bed before she got out at all.

Q. I want you to state generally what her condition was following the accident.

A. On the night of February 11th, while waiting to cross ——

The Court: 1925?

The Witness: 1925. While waiting to cross the tracks on Kings Highway West, she was hit, presumably by a piece of brake shoe, in the abdomen, and knocked down unconscious, she was picked up and taken to the watch house and later brought home by two gentlemen and put to bed, she was in a complete state of shock at that time, suffering excruciating pain, it was necessary to administer opium hypodermically in order to give her some little relief, and then a careful examination the following morning revealed she had had a very severe knock or bruise to the abdomen, causing what we call a blood tumor, and this blood tumor was the size of a child's head, and as a result of this injury she developed peritonitis, traumatic peritonitis, traumatic cystitis, and the following morning she had a hemorrhage, and these hemorrhages continued for many weeks, and she also had a traumatic cystitis, which means inflammation of the bladder, and later on she developed, as the results of this accident, an intensive tremor, which is a shaking condition of the hands which is aggravated by trying to pick up anything, the closer you get to it the more the hand trembles. Dr. Alfred Gordon claims she will never get over this condition.

Q. What is her condition today?

A. Her condition is far from right, she is in poor health; at the time of this accident she weighed about 143 pounds and today she weighs 128.

Q. Is she able to be present in court?

A. Not today, she is under the weather today from other conditions, menstrual conditions, etc., which are bad at these times.

Q. Did you have the benefit of consultation with other physicians for your wife's care?

A. Dr. Strohm treated Mrs. Howard in conjunction with me, and Dr. Lavinia B. Clement, of Haddonfield, looked after her, and when she was able to be about, presumably 3 months—I have no record of this, I didn't think it would be necessary—she was taken to Dr. Bland, and she has been there different times.

Q. Dr. Strohm, Dr. Clement and Dr. Bland?

A. Yes, and we had Dr. Pelts down from the city a number of times in consultation, and Mrs. Howard has been going to Dr. Alfred Gordon at times, he is a neurologist.

Q. Did you have any conversations with any representatives of the West Jersey Railroad or the Pennsylvania following this accident?

A. Yes, sir.

Q. When was the first of these conversations?

A. The first interview I had was probably the day after the accident, Mr. MacDonald called and very nicely offered his sympathy and he said if there was anything they could do for us they would be glad to, and he was very anxious about her condition indeed, and he told me that they regretted that this thing occurred and that when I was ready to talk this matter over they thought we could have an amicable settlement, and he made frequent calls after that time, I have no records, as I said, but he probably called on an average of once a week for quite a while, and as time went along his calls became less frequent, he called up by a 'phone occasionally and he told me at different times that if I did not employ counsel or get mixed up with lawyers he

thought we could settle this thing amicably to the satisfaction of ourselves.

Q. Where did these conversations with MacDonald occur?

A. They took place at my office, and I asked Mr. MacDonald if they cared to bring in the railroad physician I would be glad to have them, and I repeated this from time to time, and he assured me that that wasn't necessary.

Q. By whom were you assured?

A. Mr. MacDonald, and I also asked Mr. MacDonald if he wished to interview Mrs. Howard at different times and he told me that wasn't necessary.

Q. Now, did you take any steps to bring the matter to a head?

A. I told the gentleman when he called at the office that Mrs. Howard was severely, critically and probably permanently injured and that we couldn't talk about any settlement or any remuneration at that time, that we would have to wait a while, and he said, "That is all right, Doctor, I will drop in and see you occasionally, and if you want me at any time you let me know by 'phone and I will be glad to come."

Q. Were you in a position, in view of your wife's physical condition, to talk settlement to the railroad at any time after this accident?

A. We were not in a position to talk settlement to the railroad company at that time or any subsequent time in the near future because we didn't know how this thing was going to turn out. For instance, let me prove that to you, please, these uterine hemorrhages continued for practically 6 months, and she was unable to hold her urine for a full year or more, and I had her over to Dr. Bland again after a year or more had elapsed and Dr. Bland came forth and said, "Doctor Howard, we know Mrs. Howard is

permanently injured, we know some of the conditions that are present, but," he says, "we don't know how much pathology is in that abdomen, and the only positive way to tell would be to open it up and look around," but he did not advise it.

Q. But finally you did bring the matter to a head by calling on the head of the claim department of the railroad?

A. Yes.

Q. What is your recollection of the time when you did that?

A. That was in October.

Q. Of what year?

A. October, 1926.

Q. That accident was in 1925?

A. Yes, sir.

Q. What did you do, who did you get in touch with?

A. Wait a minute, October—I don't know whether that was 1926 or 1927, without looking at the notes.

Q. Was it the year of the accident?

A. It was more than a year after the accident, October of the calendar year after the accident.

Q. That is 1926. What did you do and who did you get in touch with?

A. Mr. Turnbull. Mr. MacDonald treated me very nicely up to this time, everything was lovely, but I told him when it came to talking settlement I thought it would be well for me to take this matter up with the head of the department, and I made a request that Mr. Turnbull come to see me at his leisure.

The Court: Mr. Turnbull, the head of the department you referred to?

The Witness: The railroad department, the claim department, yes, sir, and he did.

Q. When did he come to see you, as nearly as you can recall?

A. Oh, sometime after that.

Q. In October?

A. About the 26th of October if I have my date correct.

Q. It was in October of 1926?

A. The 26th, I am pretty sure.

Q. He came to your house?

A. Yes, sir.

Q. Just state what you said and he said, Doctor.

A. Well, Mr. Turnbull came into my office, and we talked on the general topics of the day for a few minutes, and I said, "Mr. Turnbull, let us try to get together on this thing and see what we can do," and he bowed his head very nicely, treated me fine, and he said, "All right, Doctor, what do you think you ought to have?" I went over Mrs. Howard's condition to him briefly, and I told him $10,000 would be as little as we could afford to take, and he said, "Well, I will take this up with the company and see what we can do for you." That is the sum and substance of it, I have no notes, gentlemen, I can't swear about the phraseology.

Q. Was there anything said about his interviewing the other physicians who had been active in the case?

A. Yes, he said, "Now, Doctor, would you have any objections to me interviewing the other physicians that have seen Mrs. Howard in consultation?" and I said, "Absolutely no," and I gave him the names of the different doctors, and wrote them down.

Q. Had Mr. Turnbull seen Mrs. Howard?

A. No, sir.

Q. Did Mr. MacDonald?

A. No. Mr. Turnbull, I don't think I offered him

the opportunity to see Mrs. Howard, but I did Mr. MacDonald very frequently.

Q. In discussing the matter of settlement were you acting for your wife?

A. Yes, sir, at her request, yes, sir, she is in such a nervous condition she couldn't talk to anybody, or could not at that time.

Q. This was in October, 1926, you saw Mr. Turnbull and he left with the names of these other doctors?

A. Yes, sir.

Q. Who was to bring the matter up, was he to bring it up with you or you with him?

A. He was to let me hear from him after he interviewed these men.

Q. Did you hear from Mr. Turnbull again?

A. Yes, sir.

Q. When was that, Doctor?

A. If my memory serves me right, it was on February 10th, I think it was February 10th, because it was Thursday afternoon, which is my afternoon off, I didn't have any office hours, and I was in my office—it might have been the day before, but it was on either one of the two days, but I think it was February 10th.

Q. In the year nineteen what?

A. 1926.

Q. It was in February, 1926?

A. Excuse me, 1927.

Q. The calendar year following?

A. Yes, sir, over two years after the accident.

Mr. LeDuc: The wife's accident, I think counsel will agree, was on the 11th of February, 1925.

Mr. Shipman: Yes, that is admitted.

The Court: Not over two years, a little less than two years.

The Witness: Yes, sir.

Q. Did Mr. Turnbull come to see you on this date?
A. No, sir, he telephoned me.
Q. State, as nearly as you remember, the conversation you had on the 'phone.
A. He said, "Doctor, we have taken a good deal of time to look up this matter, we have had trouble interviewing the different physicians, getting our data, trouble to get in touch with the different physicians and getting our data, and this matter had to be referred back to the company, and so forth, and it has taken up a great deal of time, but I am in a position to make an offer today."

The Court: This was a telephone conversation?

The Witness: Yes, sir.

The Court: This is the conversation you referred to as the 9th or 10th of February?

The Witness: Yes, sir. I told him it was all right in regard to the time, we were in no hurry, and he said, "Doctor, I am afraid our company is not willing to offer you what you think you ought to have," and I said, "All right, my friend, what is the best you are going to do for us?" and he said, "About one-fourth of that amount," and I said, "What do you mean, $2,500?" and he said, "Yes"—well, I heaved a sigh, and I said, "I don't hardly think that will do, but," I said, "I will take it up with Mrs. Howard and talk the matter over and I

will come and see you, I will see you later, I will let you hear from me later,'' something to that effect.

Q. Was that the end of the conversation?

A. Yes, sir.

Q. What did he say to you?

A. I can't recall.

Q. When was the next time after that you saw Mr. Turnbull?

A. The Saturday preceding Washington's Birthday I called to see him, the Saturday preceding Washington's Birthday, it was the 19th, I believe, and I was informed by the young man who occupied the desk to the right of the door as you went in ——

Q. Had you heard from Mr. Turnbull prior to the time you went on this Saturday to his office?

A. No, sir.

Q. All right.

A. No, sir, and the young man said Mr. Turnbull was out.

By the Court:

Q. You called at his office the day you said preceding Washington's Birthday?

A. The Saturday preceding Washington's Birthday, which was the 19th of February, Washington's Birthday is the 22nd, about 9:30 in the morning accompanied with Dr. Strohm, and the young man in question called Mr. Turnbull up and he said, ''Gentlemen, I am sorry but Mr. Turnbull and his stenographer are in a conference at the ferries and he will not be through until 11 or 11:30, but he will be glad to see you at some future time,'' and I asked the young man to make an appointment and notify me by 'phone, and he did not do this to the best of my knowledge. February is a busy month for coun-

try doctors, Monday is always a busy day after Sunday, Tuesday was Washington's Birthday, and Wednesday was busy, and Thursday morning we made our pilgrimage to his office again.

Q. What day was that?

A. Two days after Washington's Birthday, the 24th of February, 1927, and we met Mr. Turnbull and he invited us in and shook hands with us, was cordial and gentlemanly, as he has always been ——

Q. You say we?

A. Dr. Strohm accompanied me, because Dr. Strohm was one of Mrs. Howard's physicians who treated her with me daily, and I said, "Mr. Turnbull, what can you do for us," or something to that effect, and he said, "Doctor, as far as the company is concerned," he said, "the matter is over, the statute of limitations has run its course," and I asked him what the statute of limitations was and he informed us that we only had two years' time to take action if we wanted to take any legal action, and I was sort of nonplused, but I waited a little while and I said, "Mr. Turnbull, we were assured and reassured that we would be taken care of and that this matter could be settled amicably," and I said, "Now, I come here to be turned down" I said, "It looks as though I am double-crossed," and he said, "Well, Doctor, I am sorry for you but it is in the hands of Broad Street," and I said, "Well, it looks to me as though I was treated like a darn dirty cur." I lost my temper, it is the first time I ever did, but I calmed down, and I think Mr. Turnbull was very sorry for me, I do, indeed, he acted the part, and he said, "Well, Doctor, I can only do one more thing for you, I can take up this matter with Broad Street and see what they will do," and I think that ended my interview, our interview.

Q. Did you or didn't you ask him to take it up with Broad Street?

A. Yes, sir.

Q. Doctor, had you, up to the time of this conversation with Mr. Turnbull on the 24th, any knowledge that there was a statute of limitations of 2 years on a case of personal injury?

A. On my honor I had not, I knew nothing about that.

Q. Had you consulted counsel at any time during the 2-year period following the injuries to your wife?

A. No, sir.

The Court: How did you escape them, didn't any counsel consult you?

The Witness: No, sir.

Q. Following this interview on the 24th, did you hear from Mr. Turnbull?

A. My last interview—no, I didn't hear from Mr. Turnbull for quite some time and then I wrote a letter and inquired about this matter.

The Court: To whom did you write?

The Witness: To Mr. Turnbull, and then I got a letter from Mr. Turnbull in reply, just a few lines.

Mr. LeDuc: I ask counsel to produce a letter of March 15th, addressed by Dr. Howard to Mr. Turnbull.

(Counsel complies.)

Q. Is that the letter you say you wrote to Mr. Turnbull?

A. That is my stationery and my signature on it. "My dear Mr. Turnbull: I have been waiting to hear from you" ——

Q. The date?

A. 3-15-27. "I have been waiting to hear from you since our last conversation at your office, February 20, 1927, when we discussed Mrs. Howard's claim of damage against the railroad. You doubtless remember that you told me you would give the matter further consideration and let me hear from you definitely within a short time what the railroad would do. May I ask if you have reached a definite decision as yet and, if so, kindly let me know. Very truly yours, J. E. Howard."

Q. Is this letter I hand you the reply you received?

A. Yes, sir. "April 18, 1927. Dr. J. Edgar Howard: My dear Dr. Howard: Referring to your letter of March 15, the subject-matter at the present time is in exactly the same position as it was when you called at this office recently. Yours very truly, A. P. Turnbull, District Claim Agent."

Mr. LeDuc: I ask that these be marked C1 and C2.

(Said letters offered in evidence and marked Exhibits C1 and C2.)

Q. After receiving that reply from Mr. Turnbull, what, if anything, did you do in regard to prosecuting your wife's claim?

A. I then consulted counsel.

Q. Did you consult counsel before that or after that?

A. I had not engaged counsel, I think I consulted

counsel, told them what I was going to do about this thing.

Q. Who was your counsel?

A. Mr. LeDuc.

Q. Now, did you, shortly after receipt of this letter of April 18th, address a letter to Mr. M. W. Clements, vice-president of the Pennsylvania Railroad Company?

A. I did.

Q. And is this the letter which I now hand you—I don't think you need read it, it is a little too long.

A. That is my stationery and my letter, and my signature.

Q. You sent this letter to Mr. Clements, of the Pennsylvania Railroad?

A. Yes, sir.

Q. How did the original happen to be in my possession, do you know?

A. The original letter in your possession?

Q. Yes, I will refresh your memory on that, let me show you a letter from the Pennsylvania Railroad, July 11th.

A. The letter was returned to me May 4th, it was returned to me and I gave it to you.

Mr. Shipman: I object to that.

Mr. LeDuc: I am offering it, if the Court please, and I understand counsel objects.

Mr. Shipman: On the ground it is a self-serving declaration, he is attempting to make out a case for himself in that letter which I don't think ——

The Court: The objection will be overruled, it is not received as evidence of the fact, it is only re-

ceived as evidence of a communication to the railroad company.

(Said letter offered in evidence and marked Exhibit C3.)

Q. Doctor, without reading this rather lengthy letter, you attempted to state your case, as you saw it, to the vice-president of the Pennsylvania Railroad?

A. I received the case as I saw it.

Q. In this you say, "Under all the circumstances I am appealing to you, the vice-president of the company, as a matter of fairness, to see that the settlement which was promised me is made." Did you get a reply to this letter?

A. There is a small reply, yes.

Q. Was that reply addressed to you or someone else?

A. That I can't say.

Q. Did you have the assistance of any other party?

A. Yes, I did.

Q. I don't know whether it is important, but a mutual friend of you and Mr. Clements took the matter up with Mr. Clements?

A. He took the letter to Mr. Clements and, incidentally, brought the reply back to me, it didn't come by mail.

Q. Your reply came through this mutual friend?

A. Yes, sir.

Q. When was it received, as nearly as you can recall?

A. I can't tell you.

Q. Do you remember the month, the letter of yours is dated April 30th, 1927?

A. Well, it was more than a month later, I should say, roughly speaking, I don't know the date.

Q. I show you this letter of July 11th, 1927, on the letterhead of the Pennsylvania Railroad Company, and ask if that refreshes your memory?

A. That is the letter that was brought to me by this gentleman here.

Q. Would you say it was shortly after that date?

A. Yes, sir, I said it was more than a month.

Mr. LeDuc: I will have this marked for identification.

(Said letter offered in evidence and marked Exhibit C4 for identification.)

Q. After Mr. Scattergood—he was the intermediary?

A. Yes, sir.

Q. Returned this letter to you and advised you that Mr. Clements was unwilling to do anything, what, if anything, did you do then?

A. Then I engaged counsel.

Q. Who was your counsel?

A. Mr. LeDuc.

Q. And instructed me to proceed with suit?

A. Yes, sir.

Cross-examination.

By Mr. Shipman:

Q. Approximately, what was the date when you engaged counsel?

A. Let me see, I should say the 1st of August.

Q. Of 1927?

A. 1927, as near as I can tell exactly.

Q. That is the first time you ever went to a lawyer about this case?

A. No, sir.

Q. When was the first time you went to a lawyer?

A. I went to a lawyer on the 18th day of February.

Q. What year?

A. Not to engage him, 1927, that is the first time, not to engage him but to tell him what I was going to do in this matter.

Q. Didn't you ask his advice in the matter?

A. No, I told him I came to make a social call, I made up my mind what I was going to do.

Q. That is the first time you went to a lawyer on the 18th of February, 1927?

A. Yes, sir.

Q. When Mr. MacDonald first called on you it was about a week after the accident, wasn't it?

A. I thought it was the following day after the accident.

Q. Was it within a week after the accident?

A. Sure it was.

Q. You didn't know, Doctor, the extent, at that time, did you, of Mrs. Howard's injuries?

A. Yes, I told him she was badly hurt, badly injured, and he didn't know how badly injured she was, and he extended his sympathy and he treated me wonderfully well.

Q. And he said he would communicate with you later on?

A. No, he said he would come and see me.

Q. When was the next time he called to see you?

A. Why, I should think within a week.

Q. What did he say then, did he say he would come back again?

A. Yes, sir.

Q. And you then discussed Mrs. Howard's condition?

A. He asked how she was and I told him she was in bed with a nurse and a couple of doctors.

Q. And you told him she wasn't in condition to discuss settlement.

A. I certainly did.

Q. Did you tell him you would let him know when you were in a position to discuss settlement?

A. Yes, sir.

Q. When did he call again?

A. I should say within a week, he called frequently for some time.

Q. Then every time he called you discussed Mrs. Howard's condition?

A. No, I can't say that, he inquired about Mrs. Howard's health, etc., and he would always say, "Doctor, if you need me at any time let me know."

Q. And left with the understanding you were to let him know when you were to talk about settlement?

A. Yes, sir.

Q. Do you remember the last time he called on you?

A. No, sir, I do not.

Q. Do you remember whether it was in the month of February, 1926?

A. I can't answer that question.

Q. Was it later than February, 1926?

A. I would think so.

Q. About what time was it, as nearly as you can fix it?

A. To make a stab at it I would say it was two or three months later than February.

Q. About May, 1926?

A. Yes, sir.

Q. What was said at that time?

A. Our conversation all along was the same language every time, I told him we were not in position to talk settlement, not in a position ——

Q. Not in a position?

A. Yes, and didn't know when we would be, but there was no hurry.

Q. And you told him you would let him know when you were in a position to talk settlement?

A. Yes, sir.

Q. And that is the last you saw of Mr. MacDonald?

A. Yes, sir.

Q. And you called Mr. Turnbull on October, 1926, is that right?

A. October 26, 1926.

Q. And had this conversation with him about—you called to see Mr. Turnbull personally?

A. No, Mr. Turnbull called to see me.

Q. Now, you say you are not clear as to whether Mr. Turnbull again called you on the 10th of February or the 9th of February?

A. I am not positive, but I think it was the 10th, because if my memory serves me I was home doing some things in the desk which I frequently do on my afternoons off.

Q. Did he call you in the morning or afternoon?

A. Afternoon.

Q. Are you sure about that?

A. I think so. I have no notes, I have got to depend upon my memory, and a couple of years is a long time to remember whether it was morning or afternoon, but I thought it was in the afternoon.

Q. Now, at the end of that conversation, did Mr. Turnbull say to you as far as he was concerned the matter was closed?

Mr. LeDuc: Which conversation?

Q. The conversation which was either on the 9th or 10th.

A. No, he didn't say that as far as he was concerned it was closed.

Q. He didn't say that?

A. No, not as far as I know, our conversation was just about as I stated here, as near as I can remember.

Q. He made an offer of $2,500 and you said you would take it up with Mrs. Howard?

A. I said, "My friend, I am afraid we will have to proceed along different lines," and he said, "All right," and I said, "However, I will take up this matter with Mrs. Howard and you will hear from me later.

Dr. Lloyd E. Strohm, sworn.

By Mr. LeDuc:

Q. Where do you live?

A. 127 White Horse Pike, Audubon, New Jersey.

Q. You are a graduate of what college?

A. Hahnemann Medical College, Philadelphia.

Q. Had you attended Mrs. Howard after her accident in 1925?

A. I did, yes.

Q. Do you recall about when you were called upon the case?

A. I think the next day it was I went to see Mrs. Howard, and I found her—do you want to know her condition?

Q. I don't think we need that. You treated her for how long?

A. Off and on I have treated her ever since, given her advice.

Q. Now, did you go with Dr. Howard to the office of the claim department of the West Jersey Railroad in Camden, in February of last year?

A. I did, yes.

Q. How many times did you go to that office, if you remember?

A. Twice.

Q. The first time did you see Mr. Turnbull?

A. No.

Q. Do you recall what day that was—maybe you remember the day of the week, perhaps?

A. You have got me there, I remember I went with Dr. Howard both times, but I can't tell you the date of the first visit.

Q. Now, I want you to tell me what you recall as to what happened on the occasion of that visit?

A. We went inside and we asked for—Dr. Howard asked for Mr. Turnbull, and a young man, presumably a stenographer attending the office, said Mr. Turnbull was in conference with his stenographer at the ferry house and wouldn't be able to see us that morning, and we then left. I think the doctor asked him about a future appointment and then we left.

Q. He asked who?

A. The young man for a future appointment.

Q. What did the young man say, if anything?

A. He said he would communicate with Mr. Turnbull and make some arrangement for a future meeting.

Q. Do you recall whether anything was said about Mr. Turnbull's stenographer or secretary?

A. Yes, he said Mr. Turnbull and his stenographer were in conference at the ferry house.

Q. Did I understand you to say the clerk telephoned Mr. Turnbull?

A. Yes, he telephoned.

Q. Was that in your presence?

A. Yes, I heard that, he telephoned.

Q. Did he repeat to you a message from Mr. Turnbull, did the clerk tell you what Mr. Turnbull told him to tell you?

A. Yes.

Q. That is your understanding of it, at least, of course, you don't know.

A. Yes, that he was in conference with his stenographer at the ferry house and that he couldn't see us and he would make a communication for a future meeting, as I recall it.

Q. Do you remember how long after this occasion you went again with Dr. Howard to Mr. Turnbull's office?

A. Well, it was some time after, but I can't tell you when it was, I think it was some time in February, on a Thursday, I believe.

Q. Can you place it with relation to Washington's Birthday?

A. Yes, sir, it was a day or two afterwards.

Q. And the other visit, can you place that with relation to the holiday?

A. It was previous to that.

Q. How many days previous?

A. I can't tell you that definitely, how many days it was previous to that time; suffice to say, I was there with the doctor, when the doctor was there I was there, and if the doctor knows the date I was there that is all that is necessary, I can't remember dates so well.

Q. Tell us what happened on the occasion of your second visit?

A. On the occasion of our second visit we saw Mr. Turnbull and he was very nice and courteous, of course, to the doctor, and the doctor said he came in reference to this matter of the injury to Mrs. Howard and what they proposed to do about it, something to that effect—I am not trying to quote his exact words—and Mr. Turnbull said he was very sorry to inform him but the statute of limitations had run on the case and they couldn't do anything about it, and the doctor flared up a little bit, he thought he was treated a little dirty, something on that order, so on and so forth, and Mr. Turnbull apparently felt sorry, which I shouldn't be surprised

---

Mr. Shipman: I object.

The Court: Yes, never mind that.

Q. You can't say how Mr. Turnbull felt, none of us know how that was.

A. Sure. He said the only thing he could do in the matter was to take the matter up with Broad Street, and that is about the sum and substance of the conversation.

Q. Let me ask you this, was this the first time you had ever seen Mr. Turnbull?

A. At the ferry house?

Q. You didn't see him at the ferry house, did you?

A. I mean at his office.

Q. On the 24th of February?

A. Market or Federal Street, I forget which, it was in his office in the Pennsylvania Railroad Building, wherever that is located.

Q. Is that the first time you had ever seen him?
A. Yes, the first time I ever saw him, and I haven't seen him since until today.

(No cross-examination.)

Mr. LeDuc: That is our case, if the Court please.

COMPLAINANT RESTS.

THE CASE FOR THE DEFENDANT.

THOMAS J. MACDONALD, sworn.

By Mr. Shipman:

Q. What is your occupation?
A. Claim investigator.
Q. By whom?
A. The West Jersey & Seashore Railroad Company.
Q. How long have you been so employed?
A. About 18 years.
Q. Did you have anything to do with the claim of Alice O. Howard and J. Edgar Howard against the West Jersey and Seashore Railroad Company?
A. I did.
Q. What connection did you have with that claim?
A. The personal investigation, and calling on Dr. Howard.
Q. When did you first see Dr. Howard?
A. Within six days after the occurrence.
Q. What was said at that time in a general way?
A. Just a discussion of Mrs. Howard's injury and the accident?

Q. What did you say?

A. I told Dr. Howard the company was sorry that the occurrence had happened and when he would be ready to take up the matter we would be glad to hear from him relative to it, and I advised him I would call again, and if I shouldn't happen to call within such a time he could get in touch with us by communication.

Q. When did you see him next?

A. I can't tell you just the exact time, Mr. Shipman, about a week or two weeks after that, I think I saw him 12 or 14 different times.

Q. In all of these 12 or 14 times what was the substance of your conversation?

A. A discussion of Mrs. Howard's progress, her recovery, convalescing, a discussion of her injuries, and the request that Dr. Howard would take up the matter with the company when he so desired.

Q. What did you reply to that?

A. I just don't understand that question.

Q. He said he would take it up with the company when he so desired?

Mr. LeDuc: No, he said he told him to take it up with the company.

The Witness: Dr. Howard said he would take it up with the company at some future time, he said when he was ready he would communicate that fact to the company, and he made the request that I should have Mr. Turnbull come down and discuss the matter with him.

Q. What was the last time you saw Dr. Howard?

A. About February 6, 1926.

Q. Where did you see him then?

A. At his home.

Q. What was said?

A. The same gist of the conversation again, that he would advise the company when he was ready.

Q. What did he say about Mrs. Howard's condition?

A. He said she was progressing favorably with her convalescing at that time.

Q. What about the question of settlement?

A. That he would take up the matter with the company.

Q. Did he say he was ready to talk settlement at that time?

A. No, sir, at no time did he tell me he was ready to discuss a settlement in my visits or telephone communications.

Q. He always said he would take it up when he was ready?

A. Yes, sir.

Q. February 26, 1926, was the last time you saw Dr. Howard about this case?

A. Yes, sir.

Cross-examination.

By Mr. LeDuc:

Q. Mr. MacDonald, you say you were a claim investigator for the West Jersey, you also act on claims against the Pennsylvania Railroad in South Jersey?

A. Yes, Mr. LeDuc.

Q. That claims department, as I understand it, covers all claims against both railroad companies?

A. Yes, sir.

Q. May I ask what was your employment before you went with the railroad?

A. I worked with the Atlantic City Railroad prior to that.

Q. How many years have you been in the game, the investigation game?

A. About 18 years, as I have said.

Q. You have given us the substance, as you say, of the conversation the 12 or 15 conversations you had with Dr. Howard?

A. Yes, sir.

Q. Do you recall his offering to let a railroad physician examine her?

A. Yes.

Q. He did do that?

A. Yes, sir.

Q. What was your reply?

A. I think, as I recall, at that time he made the offer I think I told him at that time that it wasn't necessary but, of course, that did not preclude any future desire on the part of the company to have that done.

Q. Did you ever see Mrs. Howard?

A. I think I saw Mrs. Howard once; I know that I saw her, I don't think it was more than once.

Q. These conversations were with Dr. Howard alone?

A. Yes, nobody else was ever present except the time, that once, when Mrs. Howard was present.

Q. In his office?

A. Yes, in his private office.

Q. You also recall talking to him about the matter of settlement being open if he would deal with the railroad in a fair way?

A. I don't think the word settlement was ever used, the matter of negotiation was always discussed at Dr. Howard's desire at any time when he requested that it be taken up.

Q. Was the word "adjusted" used—I don't care what the word was, you did discuss it?

A. The discussion of the conclusion of the case.

Q. You told him if he would not employ counsel you felt that the company and himself would come to an amicable arrangement?

A. No, I don't think that statement was ever made, I know that statement was never made to him, advising him not to employ counsel.

Q. I know that, but you mentioned the fact that it wasn't necessary for him to have counsel, that the matter could be settled?

A. No, I don't think that line of conversation was ever had with Dr. Howard.

Q. You don't think anything was ever said about engaging counsel at any time in the course of these 12 or 15 conversations?

A. No, as I say, I didn't think it was necessary to make a specific statement to Dr. Howard in that regard.

Q. Now, is that the reason why, you didn't think it necessary, that you think now nothing was said?

A. No, because of the pure recollection of that fact.

Q. Did you make any memorandum of these several talks you had with Dr. Howard—I don't suppose you did?

A. I would come back and write a memorandum to the effect that I called on Dr. Howard on different dates, or perhaps I made a telephone call.

Q. That was a mere diary entry?

A. Yes, sir.

Q. You didn't attempt to record the conversation?

A. Not verbatim, no.

Q. You have nothing to guide yourself at this time?

A. Except my memory.
Q. Except your memory?
A. Yes.
Q. Of course, the details of these 12 or 15 conversations might readily have slipped your mind?

The Court: Do you remember if the subject of Dr. Howard's employing counsel was mentioned in any way, shape or form; you say you did not specifically advise him not to employ counsel, but was the subject in any way mentioned, can you remember as to that?

The Witness: Yes, I can truthfully say it was not, either by Dr. Howard to me or me to Dr. Howard.

Q. As a matter of fact, Mr. MacDonald, of course, it is easier to settle a case where counsel does not intervene, that is true?
A. Well, I suppose so, Mr. LeDuc.
Q. Now, I suppose that must be your opinion from 17 years' experience. Now, as a matter of fact, when you can settle a case without counsel you are glad to do it?
A. Yes, sir.
Q. Naturally, and when you can discourage a claimant from employing counsel, who would probably take a large part of the settlement arranged, you do so?
A. That is not the primary object of our handling the matter.
Q. Of course not, but it is something to do where you can.
A. We don't advise unnecessarily that they engage counsel.
Q. And you are very willing not to have counsel?

A. That is obvious.

Q. And isn't it a matter of practice, where you can, to actively discourage the employment of counsel by claimants?

A. I don't think we make any special effort to discourage claimants from engaging counsel.

The Court: I would like to have my mind cleared just a little, I didn't make any memorandum of dates, and I would like to ask Dr. Howard a question to clear my memory.

J. Edgar Howard, recalled.

By the Court:

Q. I think you said, Dr. Howard, you saw Mr. LeDuc more socially than as an attorney on February 18th?

A. Yes, sir.

Q. That was before you had your conversation with Mr. Turnbull?

A. Yes, sir.

Mr. LeDuc: Which conversation does your Honor refer to?

Q. The conversation two days after the 22nd of February, the first day he called on Mr. Turnbull he didn't see him, the second time he did, and the first was 2 days before the 22nd you said?

A. Yes, sir.

Q. Of February?

A. Yes, sir.

Q. But both your calls, one of which you did not succeed in seeing him, and the second call when you did succeed in seeing him, was after the time you had a talk with Mr. LeDuc?

A. Yes, sir.

Q. What I wanted to inquire was whether in your conversation with Mr. LeDuc on the 18th of February you had learned of the statute of limitations?

A. I did.

Q. You learned it then?

A. Yes.

Q. I inferred you had not because you spoke of your surprise when Mr. Turnbull said they could do nothing on account of the statute, but you already had learned through Mr. LeDuc?

A. I heard it there.

By Mr. LeDuc:

Q. Why were you surprised, Doctor, when Mr. Turnbull referred to the statute, on the day following your conversation with me?

A. Well, I have never been sued and never sued anybody, it has been a record in our family down for 3 generations, and I don't think it sunk in when I was at your office, because I was only there a couple of minutes, and I didn't come there to engage you, I told you I really was making a social call, and you were busy, we never sat down, and I just talked to Mr. LeDuc probably 2 minutes standing by the window, but I was there on the 18th.

By Mr. Shipman:

Q. Did you tell him about the accident?

A. About this accident? I told him where I was going.

Q. You told him about this accident?

A. I didn't give him any details about this case at all, I told him I was going down to see Mr. Turnbull.

Q. How did he happen to mention the statute of limitations?

A. Who?

Q. Mr. LeDuc.

A. How did he mention it?

Q. How did he happen to mention it?

A. I can't tell you.

Q. You say he did mention it?

A. He did mention it, but what brought it out I can't really tell you, because I told him the steps I was going to take.

Q. You told him when the accident happened, did you?

A. I don't know whether I did or not, I don't know, my friend, I can't answer that question, because our conversation was so short.

Q. How could he tell you when the statute of limitations expired if he didn't know when the accident happened?

A. I think it came about this way, he said, "You had better step on things because the statute of limitation is ended in two years' time."

Q. He said what?

A. He told me if I was going to do anything with the company through Mr. Turnbull that I had better get busy, or step on the gas, or some expression of that kind, because the statute of limitations was only two years.

Q. From the date of the accident?

A. Yes.

Q. In other words, he told you the statute of limitations had expired?

A. I don't think I knew the date of the accident

when I called, Mrs. Howard had this marked down, that is the only record we have, and I got it from her, but at that time—probably Mr. LeDuc can enlighten you on that, I don't think I can.

Q. You don't think you told him?

A. No. I am not trying to cover up, I will answer any questions you ask me.

A. P. TURNBULL, sworn.

By Mr. Shipman:

Q. What is your occupation?

A. District claim agent for the West Jersey & Seashore Railroad Company.

Q. Were you district claim agent in February, 1925?

A. I was.

Q. When did you first talk to Dr. Howard about this claim of Mrs. Howard's?

A. October 13, 1926.

Q. Did you see him at that time?

A. At his home or office.

Q. What was said by Dr. Howard and yourself at that time?

A. He went generally into the condition of Mrs. Howard following the time of the accident ——

The Court: Did you say at your office or his?

The Witness: His office. He told me how she had been treated, that is, as to the injuries she received, the doctors who had treated her, and, finally, at the end of our conversation about that, he made

a proposition of settlement to me, and he gave me, of course, the names of all these physicians, some six in number.

Q. What did you say to him?

A. I told him I would take the proposition up with the company, and I asked him if he had any objections to our seeing the physicians he had named, and he said he had not.

Q. What did you do after that?

A. I then turned the case back to Mr. MacDonald, whose case it was, for the reason I was engaged practically night and day in New York trying to adjust some cases growing out of a derailment we had at Delair, and I had no time to give to it and I turned it over to him to see these physicians.

Q. When did the case come again to your attention?

A. I did not finish in New York until the night before Christmas, and I was played out, and I took my vacation and I didn't get back until the 15th of January, and at that time the physicians had been interviewed, it had been turned over to our company's surgeon to go over, his reply was back, and I immediately took it up with our people to determine what action they cared to have taken, our general solicitor.

Q. When did you again communicate with Dr. Howard?

A. On the morning of the 9th day of February, 1927, a trifle before 9 o'clock.

Q. How do you fix that time?

A. Do you want me to go into the general facts in connection with it and leading up to that?

Q. Yes.

A. When I took it up with our general solicitor

he said we could pay so much money providing our solicitors went over the facts further and recommended it, and I then saw our solicitors in Atlantic City and he said it was a question in his mind of a latent defect.

Q. When did you see the solicitors in Atlantic City?

A. I can't give you the exact date, but it was about two weeks before the 9th, I didn't feel that had any great bearing on it, and I don't remember that. After I had talked with him he was unwilling to discuss the question of settlement because he wanted additional facts on the question of this latent defect, and I then started in on that, and I finally saw him on the 8th day of February, 1927, in his office, gave him all the facts we had been able to gather, and I came up from Atlantic City that afternoon and I called Dr. Howard the first thing in the morning when I got there.

Q. What was said?

The Court: This was at your office?

The Witness: I asked the secretary in our office to get him on the telephone as I came in the door.

The Court: He came to your office?

The Witness: No, I talked with him on the telephone.

The Court: This was a telephone conversation?

The Witness: Yes, the telephone call was very brief, and to my mind, to the point. After I had got him, I said to him, "Doctor, our people will not

pay the amount of money you suggested, and the only amount they will pay is one-fourth of that," I said, "There has been considerable delay in getting you the answer, and I wanted you to know today what their ultimatum was, and it is one-fourth of the amount you demanded," and he said, "That will never do, I will have to take other means," and I said, "If that is your desire there is nothing further for us to do," and that was the end of the conversation.

Q. When did you next see Dr. Howard?

A. I next saw him on the 24th day of February, he did call on the 19th, but we were working on a death claim and had a lot of witnesses at the ferry, and I couldn't get away from that.

Q. At your office?

A. Yes, sir.

Q. He was accompanied by Dr. Strohm?

A. Yes, sir.

Q. What was said?

A. He came in the office, and about the first thing I said to him ——

The Court: What date was this?

Mr. Shipman: The 24th day of February.

The Witness: The first thing I said to him after we exchanged greetings was, "Doctor, have you brought suit in this matter?" and he said, "No, I didn't think it was necessary," or something to that effect, and I said, "Well, I might as well be perfectly frank with you," I said, "The statute of limitations has applied in your case and I can't give you any assurance that the company at this time will do any-

thing in settlement of the case,'' and he talked on for a little while about it and finally presented me with a list of bills aggregating $4,716, and he asked me to take up again with the company as to whether they would pay this amount of bills, and I told him I didn't know whether I could get them to reconsider or renew the proposition I had made to him, but I would see what they would do.

Q. What did you do then?

A. I talked with our people, our general solicitor, talked with our solicitors, and went back and forth, and up to the time of the letter which he wrote to me had been received I had not yet received any decision as to what they wanted to do, and I replied to him and told him things were exactly in the same condition as when he called on the 24th. The date in his letter is wrong, because the 20th was on a Sunday, and I never had any connection or anything to do with it since then.

Cross-examination.

By Mr. LeDuc:

Q. You are the district claim agent of the West Jersey?

A. I am.

Q. Does your work also cover work against the Pennsylvania Railroad in this territory?

A. I have about 15 companies.

Q. They are subsidiaries of the Pennsylvania Company?

A. Yes, and some not subsidiaries.

Q. What does your territory cover?

A. I run from Long Branch to Cape May along

the seaboard, and as far as Bordentown, taking in everything in that section with the Pennsylvania Railroad, West Jersey, or any other company affiliated with them, and I have the Tuckerton Railroad over which we do not have any jurisdiction except run our trains.

Q. You are the head of the collection department of the Pennsylvania Railroad and its subsidiaries?

A. What department?

Q. Head of the claims department?

A. Yes, sir, in this section.

Q. And you have the decision as to settlement of claims subject to the advice on legal matters pertaining to it?

A. We have a certain limit to which we go and beyond that they are referred to our district solicitors or to our general solicitors at Broad Street Station.

Q. All negotiations for settlement are in the hands of your department, is that right?

A. That is, if the accident occurs here, if the people live at a distance, I, of course, don't have anything to do with it; if they live in this section and the accident occurs in this section that comes within our jurisdiction.

Q. You have the final say in the direction of these negotiations for settlement?

A. No.

Q. You have the control over all agents who are engaged in negotiating settlement?

A. Yes, they are in my department.

Q. But the final say as to whether or not a certain settlement will be made comes from your local solicitors?

A. General solicitors and district solicitors.

Q. Who do you get in touch with first?

A. If it is a small claim we don't bother any.

Q. In this case you went to the general solicitor?
A. Yes, sir.
Q. And having heard from him you were referred to the district solicitor?
A Yes.
Q. Why are you so positive you talked to the doctor on the 13th of October, 1926?
A. I knew that the time for the statute of limitations was short, and in talking it over with our solicitors we had made up our minds we would not let the statute toll against the doctor without giving him some answer, and on that question of the latent defect I worked day and night to get an answer.

Mr. Shipman: You are talking about October 13th?

Q. You understood I was talking about October 13th.
A. I thought you meant right before the giving of the answer on the 9th of February.
Q. No, I am going back to the date of October 13, 1926, when you say you had the conference with Dr. Howard at his office in Haddonfield, what made you so positive of that date?
A. I was in New York constantly and I came home especially to go out there, and I made a memorandum of the matter afterward, after I got back.
Q. Have you got that memorandum with you?
A. Yes.
Q. Let me see it?
A. I have no objection.

Mr. LeDuc: I would like to offer it in evidence.

(Said paper offered in evidence and marked Exhibit C5.)

Q. Was this dictated by you the same day?

A. I dictated it to my secretary that afternoon when I got back.

(At this point Mr. LeDuc read the memorandum to the Court.)

Q. After this conference, do I understand you to say your duties took you to New York?

A. After this conference?

Q. Yes, on October 13th and up to the day before Christmas you were busy mostly in New York?

A. I was away continuously in New York and the New England States until the night before Christmas.

Q. When did you turn over to Mr. MacDonald the responsibility of seeing these doctors?

A. Immediately after the memorandum was typewritten I told my secretary to give it to him as soon as she had completed it and let him finish it.

Q. Have you made any reports by Mr. MacDonald as to his interviews with these doctors?

A. I haven't them here.

Q. Did he render you such reports?

A. Undoubtedly they are in our files; as I say, they were sent to our company surgeon to go over and give us his opinion on.

Q. Sent by you?

A. By our office.

Q. Did you ever see these reports?

A. To actually read them?

Q. Yes.

A. To be perfectly frank with you I don't believe I have.

Q. Do you know whether all the doctors named were interviewed by Mr. MacDonald?

A. I haven't any idea.

Q. What was the next thing you knew about this claim after you turned the matter over to Mr. MacDonald for the purpose of interviewing these doctors?

A. When I got back from my vacation I considered that an important case and I started right in on it and I went to our general solicitor and discussed the question of settlement.

The Court: Would you mind giving me that date?

The Witness: That was approximately January 15, 1927.

Q. Did you go personally to the general solicitor?
A. I did.
Q. Where was his office?
A. Broad Street Station.
Q. What was the result of your conference with him on that day?
A. He said if our district solicitor thought there was liability that we could pay as much as $2,500 in settlement.
Q. Very well, then what did you do?
A. I then saw our district solicitors in Atlantic City.

The Court: Can you give me that date?

The Witness: That was approximately—it was just about two weeks before the 9th.

Q. That would be about the 28th of ——
A. January, somewhere along there.
Q. In other words, it was two weeks after your conversation with the general solicitor?

A. Yes, about that, it was the first chance I had to get to Atlantic City.

Q. Knowing, as you say you did, the statute of limitations was running to its close, why did you let two whole weeks go by before you saw the local solictors after you had full authority from the general solictors to settle the case?

A. I had fully authority to settle subject to the approval of the local solicitors.

Q. After you got their approval you had full authority to settle?

A. Yes, sir.

Q. Why did you take ——

A. We have approximately 2500 cases a year, and I simply couldn't get to Atlantic City any sooner, and our solicitors were not in Camden prior to that time.

Q. You have a well equipped department to handle these 2500 cases a year?

A. Very well, yes.

Q. You realized the statute of limitations was growing to a close and Dr. Howard was entitled ——

A. We had definitely decided to give him an answer prior to the statute tolling.

Q. Was that your decision or was it the decision of some of the solicitors?

A. That was my decision.

The Court: When you say "we" you mean you and Mr. Bourgeois, or you and the general solicitor?

The Witness: The general solicitor wasn't so much concerned in that, it was a question between Mr. Coulomb and myself.

Q. On or about January 28, 1927, you say you say your local solicitor, which one?

A. Mr. Coulomb.

Q. In Atlantic City?

A. Yes, sir.

Q. What was the result of your conference with him?

A. I told him exactly what our general solicitor had said, and asked him what his suggestion was in the matter, and he said to his mind it was a question of a latent defect, and that we weren't liable, and he wouldn't give us an opinion that the case should be settled, and he suggested that I get some additional information, which I did.

Q. When was the result of that additional investigation reported back to Messrs. Bourgeois & Coulomb?

A. On the 8th day of February, 1927.

Q. Did you assist counsel in drawing the answer filed in this case, Mr. Turnbull?

A. I don't know whether I did or not, I have never seen the pleadings.

Q. I am referring to paragraph 6 of the answer filed, and in that you say, "On or about February 1st, 1927, they authorized the claim department to pay $2,500 in settlement of the case provided, however, that said settlement would be approved by their district solicitors."

A. In other words, this brings you from January 28th, a tentative date of February 1st.

Q. By February 1st you had in mind January 28th?

A. I don't state the date, I say tentatively.

Q. All right. "On that day"—the answer is February 1st and your testimony is January 28th—"the matter was taken up with the district solicitors and they requested the claim department to make some further investigations concerning the details of the case. The result of this further investiga-

tion was reported to the solicitors on February 5, 1927,'' and I am asking whether February 5th isn't the date rather than February the 8th?

A. It is not.

Q. Have you any memorandum which would show whether it was February 5th or February the 8th?

A. I have my memorandum of my interview with Dr. Howard.

Q. We are talking about this report on the further investigation you rendered to the solicitors, February 5th it is in your answer, and February 8th is your testimony.

A. February 5th is incorrect, for this reason, the definite date I gave Dr. Howard an answer was February 9th, and the day preceding that I went to Atlantic City and saw Mr. Coulomb, talked further about it with him, and we definitely decided we would give Dr. Howard an answer the following morning as soon as I got to the office, and I did.

Q. How were the results of this further investigation reported, in writing?

A. No, I personally saw all of these inspectors who had anything to do with the inspecting of this train on its trip to Atlantic City preceding its start, some of them were in New York, some of them were in Philadelphia, they were scattered considerable distances, and I personally saw them and got the different reports from Altoona as to the condition of the brakes, and then I reported it to Mr. Coulomb that day.

Q. The report from Altoona, that was in writing?

A. I can't tell you.

Q. How did you get it?

A. I might have telephoned for it, I 'phoned for it.

Q. Didn't you incorporate this information you got from scattered sources into a memorandum?

A. Undoubtedly I wrote a report, undoubtedly there was a letter written.

Q. Where is that, have you got it here?

A. No, I suppose it is in the file in the office.

Q. That would show whether it was the 5th or 8th of February?

A. When I saw Mr. Coulomb last?

Q. Yes.

A. I think not.

Q. Why wouldn't it, why isn't that the most reliable guide to this date that we have?

A. I have my memorandum when I talked to Dr. Howard and I know it was the day before I saw Mr. Coulomb.

Q. Is that just a matter of recollection or a matter of memorandum?

A. No, there is no memorandum as to when I saw Mr. Coulomb, I made the memorandum when I telephoned to Dr. Howard and I am positive it was the day before that I saw Mr. Coulomb.

Q. Do you keep a diary?

A. No.

Q. You have nothing to show in the office where you were on the 8th of February, or the 9th?

A. Where I was on the 9th of February?

Q. Yes.

A. I don't keep any diary.

Q. It is your understanding the 9th you were in Atlantic City and the morning of the 10th you called Dr. Howard?

A. No, I said on the 8th I was in Atlantic City and on the morning of the 9th I telephoned, the first thing in the morning.

Q. You have no idea of how your district solicitors came to make the mistake of referring to the result of this investigation as reported on the 5th of February?

A. I suppose it is a mistake of dates.

Q. Don't you imagine when they drew this answer they had a memorandum on that report made by you and they inserted in their answer the date on that memorandum?

A. I am sure I can't tell you what they had, I didn't read this and never saw them until today.

Q. When you called Dr. Howard up on the 9th, you knew there were two days more before the statute would expire?

A. I did.

Q. And you didn't say anything to him about the statute, did you?

A. Tell him that the statute applied? I did not.

Q. Did you say a word about it?

A. No, sir.

Q. You knew he had no counsel at this period?

A I did not.

Q. You did not understand he had counsel?

A. I didn't know whether he had or not, his conversation with me indicated to me he knew exactly what his rights were.

Q. What did he say to indicate that?

A. He told me that wouldn't do, that he would have to take other means, now, that was sufficient indication to me that he knew where he stood.

Q. That he probably would bring suit?

A. I suspected he would.

Q. How did that indicate he intended to bring suit in the next two days?

A. I thought so from his conversation with me and I had no idea in my mind that he did not know that the statute of limitations would apply.

Q. There wasn't anything he said, was there, that he knew that the statute of limitations applied?

A. Only that he would have to take other means, and that was sufficient, I thought, to anyone.

Q. Had you made up your mind before you picked up the receiver that you were going to advise him that his time was about up?

A. I didn't think it was within my province to tell him that the statute applied.

Q. In other words, you represented the railroad and you were loyally serving their interest when you talked to him?

A. Yes, and I thought I was fair to him.

Q. Were you fair when you did not tell him that the statute was about to expire and you were not sure whether he knew or not that the statute was about to expire?

A. I never thought that it was incumbent upon me as a part of my duties to tell a man if he didn't bring suit in a certain time he could not collect.

Q. I suppose your duty is the other way, you are the claim agent, and you are trying to protect the railroad at all cost?

A. If I had protected the railroad absolutely I could have said not a thing and let the statute toll absolutely and give him no answer at all, but I didn't do that.

Q. Had you taken up with the local solicitors the matter of the expiration of the statute when you talked to them on the 8th of February?

A. I told Mr. Coulomb—your date shows February 1st—I told him the statute of limitations would apply on February 11th, and he knew that, and so did I.

Q. Did he give you any advice as to your negotiations with Howard after that?

A. He said by all means give the doctor an answer before the statute tolled.

Q. Did he say anything before the statute tolled?

A. As soon as possible after we got this information together.

Q. You saw him again after that, on the 8th of February when only two days were left before the statute tolled?

A. Yes, sir.

Q. Did he give you any instructions as to your duties in communicating to Dr. Howard?

A. No, he asked me what I thought about it again, and I said, "I am going to give him an answer before the statute tolls and I am going to tell him tomorrow," and he said, "I think by all means you should do that."

Q. Isn't it very unusual that your agent should have taken three months to interview these six doctors to get the information he desired?

A. Unusual—I have some that have taken 18 months or more, and I haven't got them yet.

Q. These are cases where there is difficulty in locating the doctors?

A. No, sir, in some of these cases—Mr. MacDonald told me today he had been over two or three times to see them before he had a chance to interview them.

Q. You think it is the usual practice for your office to take ——

A. We were absolutely swamped with work then, we were working night and day, and I never had the case handed to me; he may have had it done, but that demanded my personal attention.

Q. Isn't it unusual to take that length of time?

A. No, I have one in the office today I have had a year.

Q. Counsel has the idea you can settle a case pretty quickly if you are interested, and it seems to me it is rather a long time to interview six doctors?

A. They don't know what we have to contend with.

Q. Your conversation with Dr. Howard, how clear is your recollection of that?

A. I am absolutely positive of what took place.

Q. Did you make a memorandum of it?

A. Yes, sir, I knew the statute was about to toll the case and I wanted him to have a definite answer before that time, and I took extraordinary precautions to see that he got the information.

Mr. LeDuc: That last is irresponsive and I move that it be stricken out.

The Court: I think it is responsive.

Q. When did you dictate this memorandum?
A. The same day.
Q. Have you got it with you?
A. Yes, sir.

Mr. Shipman: Are you going to offer it?

Mr. LeDuc: No, I am not going to offer it until I have seen it. You object?

Mr. Shipman: I object.

Q. You used in your testimony, Mr. Turnbull, the word "ultimatum," you say you used it and Dr. Howard used it, is that correct?

A. I know I used it.

Q. Up to this time the relations of your department with Dr. Howard had been very cordial?

A. I don't think they have changed any.

Q. Nothing to mar the perfect harmony of your negotiations?

A. No.

Q. And the doctor showed a relation of friendliness?

A. I am friendly, as far as I am concerned, now.

Q. You understood this offer of $10,000 was wholly tentative on his part, it was simply the first lead in the negotiation to fix a definite sum?

A. I made my memorandum here, "Will not consider less than $10,000 in settlement."

Q. As an experienced handler of claims for settlement you understood that as a mere opening gun in your negotiations, didn't you?

A. I took it as he said it, I didn't consider it one way or the other; he had an idea his wife was seriously hurt, and I can't say she isn't.

Q. Did you have in mind when you came back with the offer of $2,500 that it would be accepted?

A. I didn't think he would even consider it.

Q. The usual course of your negotiations with a claimant who has a real large claim against you is an offer to be made by one side, and an offer to be made by the other, and somewhere in between those figures you come to your final agreement?

Mr. Shipman: I object to that as irrelevant.

The Court: I think that is proper cross-examination.

A. In some cases, yes, others, no.

Q. But that is the usual course, isn't it?

A. It depends altogether on the standing of the person. I assumed from the way Dr. Howard talked to me it was $10,000 or nothing, and that is the way I reported to our general solicitor.

Q. Mr. Turnbull, don't you recall Dr. Howard, at the close of this conversation, stating to you he would like to talk it over with Mrs. Howard?

A. He never said anything at all to me about his wife in that conversation.

Q. Who closed the conversation?

A. I did.

Q. What was your last word?

A. I said, "Well, that is all I can do."

Q. Did you hang up the receiver then?

A. Yes, after he had gone.

Q. What?

A. After he went, about the same time I went.

Q. What do you mean, went?

A. He simply hung up the receiver at the same time I did, and the conversation was closed.

Q. Rather abruptly?

A. I thought he was, yes.

Q. Weren't you abrupt?

A. Absolutely not.

THOMAS J. MACDONALD, recalled.

Mr. Shipman: I suppose I had better rest my case before you call him.

Mr. LeDuc: Excuse me.

Mr. Shipman: I haven't, but I will now.

By Mr. LeDuc:

Q. Mr. MacDonald, you recall Mr. Turnbull seeing you shortly after October 13th and telling you about an interview he had with Dr. Howard?

A. No, Mr. Turnbull did not have any conversation with me, Mr. Turnbull's negotiations are sep-

arate and apart from mine, I personally have no knowledge of that.

Q. I want to know whether he turned over to you the names and addresses of a number of doctors for interview?

A. He did.

Q. He did that when?

A. Approximately around that date.

Q. October 13, 1926?

A. Approximately that date.

Q. What did you do with that list?

A. I interviewed the different doctors at various times, I made more than one call before I could find the different physicians in, they were the class of men who were extremely busy, around Walnut Street, and Spruce Street.

Q. Did you see them all?

A. Yes, before I finally turned the reports back to the file.

Q. Did you see Dr. Strohm?

A. Dr. Strohm was one of them.

Q. Where is his office?

A. I think it was on Spruce Street, or somewhere down there, I can't recall now.

Q. His office is in Audubon, did you ever go there in connection with this case?

A. No, I think Dr. Strohm lived in Audubon, but as I recall, he has a Philadelphia office, and as I recall, I can't say positively whether it was Spruce or Pine, but I remember it was on the south side of the street.

Q. When did you make your final report of the interview with these doctors?

A. I can't give you the date from recollection?

Q. I don't expect you to, but about when was it?

A. I can't tell you that, about two or three months

following that time, as Mr. Turnbull told you, we were exceedingly busy.

Q. You were the gentleman assigned to this case?

A. Yes, that case was turned over to me.

Q. You were in touch with it from the beginning, you knew the date of the accident?

A. Yes, sir.

Q. You knew the statute of limitations expired on February 11, 1927, didn't you?

A. I would have if the case would have been recalled to me, naturally.

(No cross-examination.)

Mr. LeDuc: Complainants rest.

BOTH SIDES REST.

The Court: I will hear counsel.

EXHIBIT C1.

(Stamp of Pennsylvania System, Camden, dated March 17 1927)

DR. J. EDGAR HOWARD
67 West Main Street
Haddonfield, N. J.

3/15/27

My dear Mr. Turnball

I have been waiting to hear from you since our last conversation at your office Feb 20/27 when we discussed Mrs. Howards claim of damages against the railroad. You doubtless remember that you told me you would give the matter further consideration and let me hear from you definitely within a short time what the railroad would do. May I ask if you have reached a definite decision as yet and if so kindly let me know.

Very truly yours
J. Edgar Howard.

EXHIBIT C2.

PENNSYLVANIA SYSTEM
Bureau of Claims, Legal Department
A. P. Turnbull
District Claim Agent
Camden, N. J., (Front and Federal Streets)
April 18, 1927.

Dr. J. Edgar Howard,
67 West Main Street,
Haddonfield, N. J.
My dear Dr. Howard:

Referring to your letter of March 15th, the subject matter at the present time is in exactly the same position as it was when you called at this office recently.

Very truly,
A. E. Turnbull,
District Claim Agent.

EXHIBIT C3.

DR. EDGAR HOWARD
67 West Main Street
Haddonfield, N. J.
April 30, 1927.

Mr. M. W. Clement,
Vice-President Pennsylvania R. R. Co.,
Broad Street Station,
Philadelphia, Pa.
Dear Sir:

My wife, Mrs. Alice O. Howard, was severely hurt as the result of a brake shoe hitting her in the abdo-

men on February 11, 1925. Mrs. Howard, about 9 P. M. was walking west on Kings Highway, on her way home. She stopped before reaching the railroad tracks, and was about thirty feet from the track. An express train passed, and as it did so, she felt something strike her in the abdominal region. She was brought home, put to bed, and remained there in a very critical condition for thirteen weeks, under the care of physicians and nurses. After that time, she was able to get around gradually, but was a semi-invalid for a year.

Her injuries are of a permanent nature, and all the facts are in the possession of the office of A. P. Turnbull, District Claim Agent, Camden, N. J.

Soon after the accident, Mr. MacDonald from Mr. Turnbull's Office called and expressed his sympathy. He continued to call at intervals, was always sympathic and on these calls, reassured the writer that the Railroad Company would compensate Mrs. Howard for her suffering and expenses and permanent disability, providing the writer would be fair-minded and not seek the services of an attorney. The writer heartily agreed to this and did not engage an attorney.

After a period of eighteen months had passed, the writer conferred with Mr. Turnbull, who assured the writer that an amicable settlement could be made with *ot* a doubt. A figure was named—$10,000. Mr. Turnbull then asked if I had any objections to his calling on the different physicians who had attended Mrs. Howard. This was gladly conceded to, especially as I had frequently asked Mr. MacDonald to send the Company physicians to examine Mrs. Howard. He always said it was not necessary that when the proper time arrived, an amicable settlement could be arrived at.

After a long period of time, Mr. Turnbull called

me on the telephone and stated that the Company was willing to pay $2500. I replied to him that I hardly thought this would do and we would most likely be compelled to proceed along different lines; however, I would take the matter up with Mrs. Howard, and let him hear from me later. About two weeks later, February, 19th, Dr. Strohm and I called on Mr. Turnbull to talk the matter over, but failed to see him. We called again on the 24th, and were very coldly informed by Mr. Turnbull that the statute of limits had ended and the Company was through with the case.

The time elapsing between the time I was in telephonic communication with him and the statute limit, I understand was less than two days. However, when Dr. Strohm and I called upon Mr. Turnbull, on the 24th, I submitted an itemized account of what I considered actual expenses, which I said Mrs. Howard would accept. Mr. Turnbull looked the account over carefully, and said after making a copy of it, he could do nothing, but would see what broad Street would do.

I waited several weeks, expecting to hear from him, and received no reply from him, although he had promised it.

I then wrote him and waited more than one week with same results. I then had one of the office forece ask him to answer my letter, and he sent me the enclosed reply.

I feel that Mr. MacDonald and Mr. Turnbull deliverately misled me into believing that an amicable settlement satisfactory to me would be made, and for that reason I did not consult an attorney.

Under all the circumstances, I am appealing to you, a Vice-President of the Company, as a matter of fairness, to see that the settlement, which was promised me, is made.

I will be very glad to call on you at any time that will suit your convenience to enlighten you upon any points which are not clear to you.

Very truly yours,

J. Edgar Howard.

EXHIBIT C5.

October 13, 1926.

Memo by A. P. Turnbull.

I today called on and interviewed Dr. John E. Howard, at his home, 67 Kings Highway West, Haddonfield, and he says that Mrs. Howard was brought home in a semi-conscious condition immediately after this accident, that she was in bed for thirteen weeks, that between six and eight months thereafter she was practically an invalid, that her abdomen at the present time is still sensitive and that at the present time she is suffering from paralysis agitanis involving the right hand so that she cannot carry a cup of coffee from the kitchen to the dining room when her help is away. Since the time of the accident she has been treated by himself in consultation with the following doctors:

Lavinia B. Clement, 124 Kings Highway West, Haddonfield, N. J.

Lawrence L. Glover, 232 Kings Highway East, Haddonfield, N. J.

Lloyd E. Strohm, 127 White Horse Pike, Audubon, N. J.

Thomas B. Lee, 527 Penn Street, Camden, N. J.

P. M. Peltz, 321 S. 20th Street, Phila., Pa. (Locust 8522)

Alfred Gordon, 1812 Spruce Street, Philadelphia, Pa.

P. B. Bland, 1621 Spruce Street, Philadelphia, Pa.

He says that prior to the accident she was in good condition but that now as a result of a serious nervous shock she is far from being well. He says that a Mr. Clark, Mr. Wills and also the pastor of the Presbyterian church have some slight knowledge of the occurrence of the accident. He says that he is perfectly willing and would be glad to have us see the physicians who have treated her as we have time and then would be glad to hear from us as to what we would consider fair consideration for the injuries received. However he says that his wife will not consider less than $10,000 in settlement.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

Between
ALICE O. HOWARD and J. EDGAR HOWARD,
Complainants-Appellees,
and
WEST JERSEY & SEASHORE RAILROAD COMPANY and
PENNSYLVANIA RAILROAD COMPANY,
Defendants-Appellants.

ON BILL FOR INJUNCTION.

ON APPEAL.

BRIEF OF BOURGEOIS & COULOMB, SOLICITORS FOR AND OF COUNSEL WITH WEST JERSEY & SEASHORE RAILROAD COMPANY AND PENNSYLVANIA RAILROAD COMPANY, DEFENDANTS-APPELLANTS.

The appeal in this case brings here for review a final decree in the Court of Chancery of New Jersey advised by Vice-Chancellor Leaming, perpetually

enjoining the defendants, or either of them, from pleading the Statute of Limitations in a cause pending in the New Jersey Supreme Court, wherein the complainants were plaintiffs, and the defendants herein, defendants, to recover damages for injuries alleged to have been received by Alice O. Howard.

POINT INVOLVED.

The only question involved is whether the conduct of the defendants prevented the complainants from bringing their suit at law within the time limited by the statute.

FACTS.

The facts out of which the controversy arises are, briefly, as follows:

On February 11, 1925, the complainant, Alice O. Howard, while standing at the Kings Highway crossing of the defendants' tracks in Haddonfield, was struck in the abdomen by part of a brake shoe, which, it is claimed, was cast off by a passing train of the defendants. Mrs. Howard was removed to her home and was confined to her bed and under the doctors' care for many weeks. Within a few days after the accident, Thomas J. MacDonald, an employe in the claim department of the defendants, called upon Dr. Howard, husband of Mrs. Howard at the doctor's office, in Haddonfield. He expressed his regret that the accident had happened, and said that when Dr. Howard was ready to discuss the

matter, he, MacDonald, would be glad to take it up with him. He told Dr. Howard that he would call again and that if the doctor desired to get in communication with him, he could do so by telephone. MacDonald made 14 or 15 calls on Dr. Howard in the course of the ensuing year, his last call being in February, 1926. Some of these calls were made by personal visits and others over the telephone. On all of these occasions Mr. MacDonald inquired of Dr. Howard the condition of his wife's health, and Dr. Howard told Mr. MacDonald that he was not yet ready to discuss the question of settlement, but when he was ready, he would inform Mr. MacDonald. Mr. MacDonald made no visit after February, 1926.

On October 13, 1926, Dr. Howard advised Mr. Turnbull, who was chief of the claim department in southern New Jersey, that he was ready to discuss the accident, and invited Mr. Turnbull to call at his, the doctor's office, at Haddonfield. Mr. Turnbull did so. On that visit, Dr. Howard explained fully, to Mr. Turnbull, the extent of his wife's injuries, what medical treatment was had, what her physicians had to say about her condition and the possibility of her complete recovery, and stated that he and his wife felt that they could not settle the case for less than $10,000. Mr. Turnbull asked Dr. Howard's permission to interview the physicians, who had attended Mrs. Howard, six in number, and received Dr. Howard's permission to do so. At about this time, Mr. Turnbull was engaged practically every day in the investigation of claims arising out of a derailment accident at Delair, N. J., which kept him from October until Christmas Eve, and practically every day of that time, either in New York, or New England. He was, therefore, unable to in-

terview Mrs. Howard's physicians, and left the matter in the care of Mr. MacDonald. Mr. MacDonald interviewed these physicians, but, owing to the pressure of the business in his own office, and his inability to get in touch with or have interviews with these physicians, did not finish this work until some time in January of 1927. When the interviews had been completed, Mr. Turnbull took up the question of Dr. Howard's demand for $10,000 with the general solicitor of the defendants, and it was there determined that if the district solicitors, upon further investigation upon the question of liability would recommend it, that $2500 would be offered to Mrs. Howard in settlement of the case.

Some time in February, 1927, Mr. Turnbull consulted the district solicitors, and was advised that the question of liability depended upon whether or not the defect in the brake shoe was a latent one, whether it could have been discovered by reasonable inspection, and whether it had been in use beyond the usual length of time.

A further investigation was then made by Mr. Turnbull, which, by reason of the fact that the various inspectors were widely scattered, at that time, was not completed until a day or two before the 8th day of February, 1927. On the 8th day of February, 1927, Mr. Turnbull again visited the district solicitors, and, after a discussion of the various reports received from the inspectors, was told that while these reports indicated that the defect was a latent one and not discoverable by reasonable inspection and that the brake shoe had not been used beyond the usual time, that in view of the character of the case, if Dr. Howard would accept $2500, it might be advisable to pay it, and that, in any event, the offer should be made.

On the morning of February 9, 1927, Mr. Turnbull called Dr. Howard on the telephone and made the offer of $2500. Dr. Howard expressed his regret and surprise at the offer, and said that he would have to take other means, but that he would interview his wife.

On the 18th of February, 1927, Dr. Howard made what he terms a social call on Mr. LeDuc, his present counsel. It was not made clear whether, at that time, he told Mr. LeDuc of the date of the accident, but, unquestionably, he was told by Mr. LeDuc that he would have to act quickly, or words to that effect, or the statute would bar him.

On the 24th day of February, 1927, in company with Dr. Strohm, he visited Mr. Turnbull and was there told that the Statute of Limitations had barred any action and that there was nothing Mr. Turnbull could do for him. He asked Mr. Turnbull to see what could be done. Later on, in the summer of 1927, he attempted to get some relief by personal application to one of the vice-presidents of the Pennsylvania Railroad Company, but without success, and, on the 27th day of August, 1927, six months after he had been advised by Mr. Turnbull that his action was barred, he and his wife instituted suit in the New Jersey Supreme Court to recover damages for the alleged accident, in which the defendants pleaded the Statute of Limitations.

ARGUMENT.

I.

It is with respectful diffidence, but, nevertheless, with a strong assurance, that counsel insists that the learned Vice-Chancellor either misunderstood or misconceived the facts in this case.

A fair analysis of his opinion clearly indicates such a situation.

The Opinion.

A.

Vice-Chancellor Leaming says (p. 15, l. 35; p. 16, l. 4):

> "The testimony submitted at final hearing in this Court cannot be said to be in material conflict, or the facts in doubt, except as to a certain telephone conversation which occurred on February 9th or 10th, 1927—one or two days before the statutory period for suit expired."

And (p. 16, ll. 18-26):

> "And during all of that period both Mr. MacDonald and Dr. Howard appear to have assumed and to have given mutual expression to the view that an amicable settlement could be made when the extent of Mrs. Howard's injuries could be definitely ascertained, and that it would be unnecessary for complainants to employ an attorney."

From these extracts, it will be seen that the Vice-Chancellor holds that there is no substantial dispute as to the following points:

1. That an amicable settlement could be had.

2. That it would not be necessary for Dr. Howard to employ a lawyer.

We respectfully submit that a reading of the testimony will not justify the statement that there was no substantial dispute upon these two points.

Dr. Howard's testimony on these two points is as follows (p. 34, l. 21; p. 35, l. 2):

> "Q. When was the first of these conversations?
>
> A. The first interview I had was probably the day after the accident. Mr. MacDonald called and very nicely offered his sympathy and he said if there was anything they could do for us they would be glad to, and he was very anxious about her condition, indeed, and he told me that they regretted that this thing occurred and that when I was ready to talk this matter over they thought we could have an amicable settlement, and he made frequent calls after that time; I have no records, as I said, but he probably called on an average of once a week for quite a while, and, as time went along, his calls became less frequent; he called up by a 'phone occasionally, and he told me at different times that if I did not employ counsel or get mixed up with lawyers, he thought we could settle this thing amicably to the satisfaction of ourselves."

Mr. MacDonald's testimony on these points is as follows (p. 57, l. 30; p. 59, l. 13—cross-examination):

"Q. You also recall talking to him about the matter of settlement being open if he would deal with the railroad in a fair way?

A. I don't think the word settlement was ever used; the matter of negotiation was always discussed at Dr. Howard's desire at any time when he requested that it be taken up.

Q. Was the word 'adjusted' used—I don't care what the word was, you did discuss it?

A. The discussion of the conclusion of the case.

Q. You told him if he would not employ counsel you felt that the company and himself would come to an amicable arrangement?

A. No, I don't think that statement was ever made; I know that statement was never made to him, advising him not to employ counsel.

Q. I know that, but you mentioned the fact that it wasn't necessary for him to have counsel, that the matter could be settled?

A. No, I don't think that line of conversation was ever had with Dr. Howard.

Q. You don't think anything was ever said about engaging counsel at any time in the course of these 12 or 15 conversations?

A. No, as I say, I didn't think it was necessary to make a specific statement to Dr. Howard in that regard.

Q. Now, is that the reason why; you didn't think it necessary; that you think now nothing was said?

A. No, because of the pure recollection of that fact.

Q. Did you make any memorandum of these several talks you had with Dr. Howard—I don't suppose you did?

A. I would come back and write a memorandum to the effect that I called on Dr. Howard on different dates, or perhaps I made a telephone call.

Q. That was a mere diary entry?

A. Yes, sir.

Q. You didn't attempt to record the conversation?

A. Not verbatim, no.

Q. You have nothing to guide yourself at this time?

A. Except my memory.

Q. Except your memory?

A. Yes.

Q. Of course, the details of these 12 or 15 conversations might readily have slipped your mind?

The Court: Do you remember if the subject of Dr. Howard's employing counsel was mentioned in any way, shape or form; you say you did not specifically advise him not to employ counsel, but was the subject in any way mentioned; can you remember as to that?

The Witness: Yes, I can truthfully say it was not, either by Dr. Howard to me, or me to Dr. Howard."

Again, he says (p. 60, ll. 2-5):

"Q. And isn't it a matter of practice, where you can, to actively discourage the employment of counsel by claimants?

A. I don't think we make any special effort to discourage claimants from engaging counsel."

We submit that it cannot be said that there is no substantial dispute as to the facts in view of Mr. MacDonald's flat denial that there was ever any such conversation between him and Dr. Howard with respect to the employment of counsel or that he ever advised Dr. Howard not to employ counsel. We further submit that there is no testimony which justifies the Vice-Chancellor's statement that if he, Dr. Howard, would not employ counsel, the case would be amicably adjusted to the satisfaction of all parties. Dr. Howard's testimony at most simply declares that if counsel would not be employed, an amicable adjustment *might be had.*

B.

Vice-Chancellor Leaming further says (p. 16, ll. 29-35):

> "In October, 1926, Dr. Howard and Mr. MacDonald determined that Mrs. Howard's condition was sufficiently defined to justify a consideration of the terms of settlement and Mr. Turnbull, as the superior officer of defendants' district claims department, was notified to that effect."

We submit that there is no testimony, either on the part of Dr. Howard or anybody else, which justifies the above statement.

Mr. MacDonald says the last time he saw or talked with Dr. Howard was in February, 1926 (p. 55, l. 34; p. 56, l. 22):

> "Q. What was the last time you saw Dr. Howard?
>
> A. About February 6, 1926.

Q. Where did you see him then?

A. At his home.

Q. What was said?

A. The same gist of the conversation, again, that he would advise the company when he was ready.

Q. What did he say about Mrs. Howard's condition?

A. He said she was progressing favorably with her convalescing at that time.

Q. What about the question of settlement?

A. That he would take up the matter with the company.

Q. Did he say he was ready to talk settlement at that time?

A. No, sir, at no time did he tell me he was ready to discuss a settlement, in my visits or telephone communications.

Q. He always said he would take it up when he was ready?

A. Yes, sir.

Q. February 26, 1926, was the last time you saw Dr. Howard about this case?

A. Yes, sir."

Dr. Howard testified that the last call was in May, 1926 (p. 48, l. 25; p. 49, l. 17):

"Q. Do you remember the last time he called on you?

A. No, sir, I do not.

Q. Do you remember whether it was in the month of February, 1926?

A. I can't answer that question.

Q. Was it later than February, 1926?

A. I would think so.

Q. About what time was it, as nearly as you can fix it?

A. To make a stab at it, I would say it was two or three months later than February.

Q. About May, 1926?

A. Yes, sir.

Q. What was said at that time?

A. Our conversation all along was the same language every time; I told him we were not in position to talk settlement, not in a position ——

Q. Not in a position?

A. Yes, and didn't know when we would be, but there was no hurry.

Q. And you told him you would let him know when you were in a position to talk settlement?

A. Yes, sir.

Q. And that is the last you saw of Mr. MacDonald?

A. Yes, sir."

Again, he says (p. 36, ll. 25-32):

"Q. That is 1926. What did you do and who did you get in touch with?

A. Mr. Turnbull. Mr. MacDonald treated me very nicely up to this time; everything was lovely, but I told him, when it came to talking settlement, I thought it would be well for me to take this matter up with the head of the department, and I made a request that Mr. Turnbull come to see me at his leisure."

Dr. Howard's testimony clearly shows that he did not see or talk with Mr. MacDonald after May, 1926, and that up to that time he was not in a position to discuss settlement, and that he was not in position to discuss settlement until October. When that time arrived, he got in touch with Mr. Turnbull. There is not a line of testimony, in either Dr. Howard's or

MacDonald's evidence, which would justify the inference that, in October, MacDonald and Dr. Howard agreed that Mrs. Howard's condition was such as to justify a discussion of the question of settlement.

C.

Vice-Chancellor Leaming further says (p. 17, l. 10):

> "From that date until February 9th or 10th, 1927, Dr. Howard confidently awaited a reply from Mr. Turnbull, touching the amount defendants would pay."

There is no testimony in this case, on the part of Dr. Howard, that he confidently awaited any reply from Mr. Turnbull. Nor did anything that Mr. Turnbull said on that occasion justify an inference that he confidently awaited any reply.

Dr. Howard's testimony is as follows (p. 37, ll. 10-24):

> "Q. Just state what you said and he said, Doctor.
>
> A. Well, Mr. Turnbull came into my office, and we talked on the general topics of the day for a few minutes, and I said, 'Mr. Turnbull, let us try to get together on this thing and see what we can do,' and he bowed his head very nicely, treated me fine, and he said, 'All right, Doctor, what do you think you ought to have?' I went over Mrs. Howard's condition to him, briefly, and I told him $10,000 would be as little as we could afford to take, and he said, 'Well, I will take this up with the company and see what we can do for you.' That is the sum and substance

of it; I have no notes, gentlemen; I can't swear about the phraseology."

D.

The Vice-Chancellor says (p. 17, ll. 28-36):

"The only dispute touching the substance of the telephone conversation of February 9th or 10th is that Mr. Turnbull says that he named twenty-five hundred dollars as an ultimatum and that Dr. Howard definitely and finally refused to accept that amount and stated that he would 'take other means'; Dr. Howard says that his reply was that he did not think Mrs. Howard would accept that amount, but that he would submit the offer to her and apprise Mr. Turnbull of her determination."

Dr. Howard's testimony is as follows (p. 50, ll. 11-20):

"Q. He made an offer of $2,500 and you said you would take it up with Mrs. Howard?

A. I said, 'My friend, I am afraid we will have to proceed along different lines,' and he said, 'All right,' and I said, 'However, I will take up this matter with Mrs. Howard and you will hear from me later.'"

There can be only one interpretation of the use of these words, "we will have to proceed along different lines," and that is, that he, Dr. Howard, would institute a law-suit. Mr. Turnbull was certainly justified in assuming that that was what Dr. Howard intended to do. In disregarding this language used by Dr. Howard, the Vice-Chancellor failed to give

consideration to an important factor in the case, namely, that Dr. Howard had rejected Mr. Turnbull's offer of $2,500 and had determined to institute a law-suit.

E.

Vice-Chancellor Leaming further says (p. 18, l. 10):

> "There can be no doubt, from the evidence, that Dr. Howard fully understood, during the entire statutory period, that the liability of defendants for damages would not be contested, nor can it be doubted that his belief in that respect was caused by the attitude of the representatives of defendants, and that his failure to employ an attorney prior to the expiration of the statutory period was due to that belief."

There is no testimony in this case which justifies the Vice-Chancellor in this statement. The question of defendants' liability for this accident was nowhere mentioned, either by MacDonald, Turnbull or Dr. Howard, and there is not a line of testimony in this case to warrant the inference, even to the extent that the case would be amicably adjusted independent of the question of liability. As we have pointed out, Dr. Howard's testimony only goes to the extent that the case *might be settled*.

Mr. MacDonald denies emphatically that he even went that far. So far as the employment of counsel be concerned, we have discussed that above. We need only say here that the Vice-Chancellor, as we have pointed out, evidently thought Dr. Howard's statement, concerning the employment of counsel, was admitted by MacDonald, whereas, it was, on the contrary, emphatically denied.

F.

He also said (p. 18, ll. 15-21):

> "The evidence also establishes that during the period between the casualty and October, 1926, Dr. Howard and Mr. MacDonald concurred in the view that the amount of damages could not be adequately considered until Mrs. Howard's condition should become more clearly defined."

Again, we insist that there is no justification for this statement. The testimony of both Dr. Howard and Mr. MacDonald clearly shows that all that Mr. MacDonald did was to inquire of Dr. Howard, from time to time, as to what his wife's condition was, and whether he, Dr. Howard, was ready to discuss the question of settlement. This clearly appears from Dr. Howard's testimony. Touching the last interview he had with Mr. MacDonald, Dr. Howard testified (p. 49, ll. 1-13):

> "Q. What was said at that time?
>
> A. Our conversation all along was the same language every time; I told him we were not in position to talk settlement, not in position ——
>
> Q. Not in a position?
>
> A. Yes, and didn't know when we would be, but there was no hurry.
>
> Q. And you told him you would let him know when you were in a position to talk settlement?
>
> A. Yes, sir.
>
> Q. And that is the last you saw of Mr. MacDonald?
>
> A. Yes, sir."

This testimony of Dr. Howard clearly shows that he was the one who was deciding whether or not he was ready to discuss settlement, and that Mr. MacDonald took no part in determining the question as to whether Mrs. Howard's condition had reached such a stage as to warrant a discussion of the question of settlement.

The accuracy of the Vice-Chancellor's statement in this connection, viewed from one point of view, may not be of much importance. We think, however, from a wider point of view, it makes considerable difference, for the reason that it shows that the Vice-Chancellor was, at all times, under the belief, not warranted by the facts, that MacDonald and Dr. Howard were in close communication at all times and that, in all of their interviews, the question of Mrs. Howard's condition was discussed, and that then both Dr. Howard and Mr. MacDonald agreed that her condition had not reached the stage for a discussion of settlement.

G.

Vice-Chancellor Leaming further said (p. 20, ll. 7-18):

> "In the present case, it seems clear that from the date of the casualty (February 11th, 1925) until October, 1926, the attitude of defendants' representative was not only calculated to induce Dr. Howard, as representative of his wife, to believe, but did in fact induce him to believe, that no question was to be raised touching defendants' responsibility for the casualty, and that the amount to be paid as damages could best be determined by waiting the course of

> Mrs. Howard's recovery, and that, in consequence, no necessity existed for her to employ an attorney."

We have heretofore discussed some of the elements that enter into a consideration of the lack of justification for the above statement. It would serve no useful purpose to repeat them here. We wish, however, again to emphasize the fact that there is not a line in the case, either in the testimony of the complainant or that of the defendant, that the liability of the defendant for this accident was ever discussed. Dr. Howard testified nowhere that liability was admitted or that the only question to be considered was that of the amount of damages. It is quite significant that Dr. Howard nowhere in any of his testimony states that he was deterred from beginning his action by anything, the defendants or their representatives, Turnbull or MacDonald, said to him. Again we repeat that Dr. Howard nowhere said that Mr. MacDonald told him that the question of damages could not be discussed until Mrs. Howard's condition had become more definitely determined. In fact, the situation is just the contrary. Dr. Howard, himself, says that he waited until October, 1926, to call in Mr. Turnbull because it was not until then that he, Dr. Howard, was in position to make a settlement. He at no time consulted with Mr. MacDonald or Mr. Turnbull to learn from them whether Mrs. Howard's condition was such as to justify such a discussion of settlement. So far as the employment of counsel is concerned, we have discussed this point and set forth the testimony in the early part of this brief.

H.

Vice-Chancellor Leaming further said (p. 21, ll. 18-25):

> "But, even assuming the telephone conversation to have been as narrated by Mr. Turnbull, I am impressed that, in the circumstances already narrated, it was unreasonable, unjust, unfair and unconscientious for Mr. Turnbull to delay his promised report from the preceding October until almost two days before the expiration of the statutory period, knowing that Dr. Howard had been awaiting a reply from him during all that time, and then precipitously declare his offer an ultimatum, without at least apprising Dr. Howard of the fact, then admittedly in Mr. Turnbull's mind, that only two days remained for suit. The effect of his conduct was to subject complainants' claim to the bar of the statute, and that effect, in the circumstances stated, appears to have been the natural and probable effect reasonably within the contemplation of Mr. Turnbull."

Dr. Howard testified that, notwithstanding 14 or 15 calls made upon him by Mr. MacDonald, the last of which, according to MacDonald, was in February, 1926, and according to Dr. Howard, in May, 1926, Dr. Howard repeatedly said that he was not in a position to discuss the question of settlement. Admittedly, from May 26th to October 26th, and we contend from February 26th to October 26th, there was no communication whatever between Dr. Howard and the defendants. The last interview or call was initiated by Mr. MacDonald, at which time,

whether it was in May or February, 1926, Dr. Howard said that he was not yet ready to discuss the question of settlement or the extent of his wife's injuries.

It was not until October, 1926, a year and eight months after the accident, that he informed Mr. Turnbull that he and his wife demanded $10,000. Let us again repeat that this delay was due in no wise to anything said by any of the defendants' employes. It was solely the result of Dr. Howard's own desire to learn more definitely the extent of his wife's injuries, and was neither induced or consented to by defendants' employes. The fact is, that every approach was made by the railroad companies' employes for the purpose of finding out whether Dr. Howard was ready, and he repeatedly said he was not. As we have above pointed out, he does not even contend, in the discussion with Mr. MacDonald, whether, on any of these 14 or 15 occasions, the time was ripe to discuss the question of settlement, but depended solely upon his own judgment with respect thereto. We, therefore, have the situation where the railroad companies waited a year and eight months to learn whether or not Dr. Howard was willing to discuss the question of settlement, and yet, the Vice-Chancellor says that the defendant was unreasonable in waiting something less than four months before giving him an answer.

The accident was due to a part of a brake shoe, which was thrown off by a passing train. In defendants' view of the case, liability depended upon whether or not the defect in the brake shoe was a latent one, whether it could have been discovered by reasonable inspection, whether there had been an inspection, and whether the shoe had been used for a longer period than such articles were customarily

used. On the question of damages, the question required an interview with six practicing physicians. Mr. Turnbull testified that at the time Dr. Howard asked him to call, in October, 1926, he, Turnbull, was busily engaged in New York and New England, endeavoring to adjust claims arising out of a railroad accident at Delair, N. J., and that he turned the matter of seeing the physicians over to Mr. MacDonald (p. 69, l. 26).

Mr. MacDonald testified that he used every reasonable means to see these physicians, that there were a great many cases in his office which required his attention and that he could not devote all his time to this one case.

Mr. Turnbull further testified that from October 13, 1926, until the day before Christmas, he was in New York or New England practically every day, and that he arrived home on December 24th, but took his vacation, which lasted until January 15th, and, on or about that time, having had the report of the physicians before him, he took the matter up with the general solicitor of the defendants at Broad Street Station, and was advised by him that they would offer $2,500, and that the district solicitors should first be consulted for their views on the question of liability.

Mr. Turnbull testified that this recommendation was given by the general solicitor of the railroad company either January 28th or February 1st, that he then got into communication with one of the district solicitors, who advised him that some investigation should be made as to the condition of the brake shoe involved in the accident, whether there had been an inspection, what the result of the inspection was, how long the brake shoe had been in use and the customary length of time for the use

of such brake shoe. Mr. Turnbull said that it took him several days, owing to the fact that the witnesses were scattered, before he could get this information; that, on February 8th, he presented it to the district solicitor and was advised by him that while the information received seemed to show there was no liability, yet in view of the character of the case, it might be well to make the offer of $2,500. Mr. Turnbull then says, on the morning of the 9th of February, he called Dr. Howard on the telephone and advised him that the railroad company would pay only $2,500. Dr. Howard expressed his surprise and regret and said that he would have to take other means, but that he would take it up with his wife. We respectfully insist that the failure to reply to Dr. Howard's demand within four months, when Dr. Howard, himself, waited a year and eight months before he made any demand, was neither unreasonable, unjust, unfair or unconscientious.

Mr. Turnbull's testimony on this phase of the case is as follows (p. 64, l. 11; p. 66, l. 10):

"Q. What did you do after that?

A. I then turned the case back to Mr. MacDonald, whose case it was, for the reason that I was engaged practically night and day in New York, trying to adjust some cases growing out of a derailment we had at Delair, and I had no time to give to it, and I turned it over to him to see these physicians.

Q. When did the case come again to your attention?

A. I did not finish in New York until the night before Christmas, and I was played out, and I took my vacation and I didn't get back until the 15th of January, and at that time the physicians had been interviewed, it had been turned over

to our company's surgeon to go over, his reply was back, and I immediately took it up with our people to determine what action they cared to have taken, our general solicitor.

Q. When did you again communicate with Dr. Howard?

A. On the morning of the 9th day of February, 1927, a trifle before 9 o'clock.

Q. How did you fix that time?

A. Do you want me to go into the general facts in connection with it and leading up to that?

Q. Yes.

A. When I took it up with our general solicitor he said we could pay so much money providing our solicitors went over the facts further and recommended it, and I then saw our solicitors in Atlantic City and he said it was a question in his mind of a latent defect.

Q. When did you see the solicitors in Atlantic City?

A. I can't give you the exact date, but it was about two weeks before the 9th; I didn't feel that had any great bearing on it, and I don't remember that. After I had talked with him, he was unwilling to discuss the question of settlement because he wanted additional facts on the question of this latent defect, and I then started in on that, and I finally saw him on the 8th day of February, 1927, in his office, gave him all the facts we had been able to gather, and I came up from Atlantic City that afternoon and I called Dr. Howard the first thing in the morning when I got there.

Q. What was said?

The Court: This was at your office?

The Witness: I asked the secretary in our office to get him on the telephone as I came in the door.

The Court: He came to your office?

The Witness: No, I talked with him on the telephone.

The Court: This was a telephone conversation?

The Witness: Yes, the telephone call was very brief, and, to my mind, to the point. After I had got him, I said to him, 'Doctor, our people will not pay the amount of money you suggested, and that the only amount they will pay is one-fourth of that.' I said, 'There has been considerable delay in getting you the answer, and I wanted you to know today what their ultimatum was, and it is one-fourth of the amount you demanded,' and he said, 'That will never do; I will have to take other means,' and I said, 'If that is your desire there is nothing further for us to do,' and that was the end of the conversation.''

We have discussed the Vice-Chancellor's opinion, at some length, and have given, we think, a fair and impartial discussion of the testimony upon each phase of the opinion, and we submit that the testimony justifies our criticism.

II.

We now pass to a brief discussion of the cases cited by the Vice-Chancellor.

Freeman v. Conover (95 N. J. L. 89), involved the right to interpose an equitable defense to the

Statute of Limitations in a court of law. This right was denied. In the Freeman case, the suit concerned was brought for the sale price of stock, which had been voluntarily sold by the custodian thereof. A suit was brought eight years after the stock had been sold, but the fact of the sale had been concealed from the plaintiffs until shortly before the action at law was brought. To a defense of the Statute of Limitations, the plaintiffs urged that the cause of action had been fraudulently concealed. The Supreme Court, while admitting this to be true, held that that fact was not an answer to the defense of the Statute of Limitations at law.

There is no contention in this case that there was any concealment of the facts upon which the plaintiffs' cause of action rested.

In the case of *Martin v. State Insurance Co.* (44 N. J. L. 485), it will be observed that the limitation relied upon by the insurance company was not that of a public statute, but one arising out of a private contract. It will be observed that the validity of the policy was recognized by the insurance company after the expiration of the limitation, and, furthermore, that certain conditions precedent to the bringing of suit imposed by the insurance company in its policy by reason of the act of the insurance company itself could not be complied with until after the sixth months' period had expired. While it is true that in the above case the Court held that negotiations for settlement might relieve the insured upon the forfeiture of his rights under the policy, we submit that the case as cited by Mr. Justice Dixon are all cases involving insurance policies in which evidence tending to show waiver of conditions is under consideration, a pure legal question arising out of the terms of a private contract and not

equitable considerations arising in the application of a public statute.

The case of *Martin v. State Insurance Co., vide supra,* has no application to the case at bar. In the present case, there were no negotiations for settlement. Dr. Howard, himself, prevented such negotiations by declining to make any demand until a year and eight months after the accident.

The case of *Halloway v. Appelget* (55 N. J. E. 583), was one involving fraudulent concealment of a cause of action until after the statute had run.

The case of *Clark v. Augustine* (62 N. J. E. 689), was one against executors. The defense was that the action was not brought within three months from the date of the service of statutory notice upon the creditor. A bill was filed in the Court of Chancery to restrain the executors from pleading the bar of the statute on the ground that they, by their action, *prevented* (italics ours) the service of process, it appearing that during the whole of said period of three months, the executors were not in reach of process. The Court of Chancery, in deciding this case, said that it did not make any difference whether the act which prevented the bringing of suit, *i. e.,* the absence of the executors from the jurisdiction of the Court, was wilful or not.

In the case of *Magner v. Mutual Life Association* (44 N. Y. S. 862), the insurance policy provided that suit must be brought within six months from the date of the death of the insured. The insured died March 14, 1895. On August 21st, the insurance company wrote the beneficiary that the claim would be considered August 21st. On September 11th, defendant's secretary wrote the executor that the claim had been rejected. This was three days before the statute expired. In this case, we again submit that

the waiver of forfeiture provisions contained a private contract, *i. e.*, a policy of insurance, every intendment being in favor of the insured and against the insurer. Such is not the situation in a case like the present, in which no question of private contract is involved.

In the case of *Thompson v. Phoenix Insurance Co.* (136 U. S. 287, 34 L. Ed., 413), there was an absolute promise to pay the amount of the claim. The insured was asked to wait until certain other matters could be adjusted. The promise was an unequivocal promise to pay the amount of the claim. This is, of course, an entirely different situation from that involved in the present case. In the case of *Thompson v. Phoenix Insurance Co.*, there was an absolute promise to pay a definite amount of money, to wit, the amount of the insurance claim. In the present case, there was, at most, an offer to discuss settlement when Dr. Howard announced himself ready to act.

In the case of *Lamb v. Martin* (43 Eq. 34), Van Fleet, V. C., speaking for the Court of Chancery, said (pages 36-37):

> "The power of a Court of Equity to prevent a defendant, by injunction, from setting up the Statute of Limitations as a defense to an action at law, which he has wrongfully procured to be restrained until sufficient time has elapsed to render such a defense available, must, I think, on the plainest principle of justice, be regarded as entirely free from doubt. The reasons which should control the action of the Court in such cases were stated by Chancellor Williamson in Doughty v. Doughty, 2 Stock., 347, as follows: 'It would be unconscientious for a party to plead the Statute of Limitations

against an adversary, who, at his solicitation, had been enjoined from prosecuting his suit; and it would seem to be the appropriate remedy that the same instrument which he had used to interrupt the legal proceeding of another should be interposed, as a shield, to prevent his taking an undue advantage of such interruption.' But the power of the Court thus to control a citizen and deprive him of a right of defense, conferred by legislative enactment, rests, in my judgment, exclusively on the maxim that no man shall be permitted to take advantage of his own wrong. Justice will not permit a litigant first to prevent his adversary from seeking redress by suit at law for a wrong he has committed against his adversary, until his adversary's right of action is barred by lapse of time, and then when his adversary is relieved from the restraint which he has caused to be put upon him, and sues, to turn upon his adversary and say, 'You are too late—you have lost your right of action by your laches.' There is no laches in such a case. His adversary did not sue before because he was prevented. And that is the foundation of the jurisdiction which equity exercises in such cases. *It is an indispensable requisite, where a plaintiff in a suit at law applies to a Court of Equity to restrain the defendant from pleading the Statute of Limitations, that it shall be made clearly to appear that he was prevented, by the act of the defendant, from bringing his suit at law until his right of action was barred by the statute.''* (Italics ours.)

In order to justify the present decree, it must clearly appear that the complainants in this suit

were prevented, by the act of the defendants, from bringing their suit within the statutory period. In the application of this principle, we point out the following factors:

1. From the date of the accident to October, 1926, Dr. Howard had not yet been able to determine the full extent of his wife's injuries. This is, of course, no excuse for not bringing the suit.

2. From the time of the last interview of Mr. MacDonald, in February or May, 1926, until his interview with Mr. Turnbull, in October, 1926, a period of five to eight months, he did not hear from the railroad company nor did he communicate with the company.

3. At the interview with Mr. Turnbull, in October, 1926, when Dr. Howard first made his offer of $10,000, there was no assurance made by Mr. Turnbull that that offer would be accepted or that any other offer be made in lieu of it.

4. At the time of Dr. Howard's interview with Mr. Turnbull, on February 24th, after the statute had run, he made no claim that MacDonald had suggested that the suit could be amicably adjusted if he, Dr. Howard, did not employ counsel.

All of the above factors clearly appear from the evidence of Dr. Howard, MacDonald and Turnbull.

Passing, now, to the fair and reasonable inference which may be drawn from the testimony, particularly of Mr. MacDonald, he being the principal agent who was alleged to have lulled Dr. Howard into security in a belief of settlement, we find that

his conduct was that of a claim agent whose duty it was to learn, if possible, the extent of the injuries of the claimant, whether there was a willingness to discuss settlement, and if there were, the amount which the claimants wanted.

Keeping these factors, and fair inference from the testimony in mind, we insist that the complainants' case fails entirely to measure up to the rule laid down by Vice-Chancellor Van Fleet in the case of *Lamb v. Martin,* above quoted.

It further appears, from the testimony in this case, that before there could be any discussion of settlement, it was necessary for Dr. Howard to bring his figures to the attention of the defendants. They were powerless to accept or reject until Dr. Howard submitted his claim. Of course, it is not claimed in this case that he was prevented from submitting these figures by an act of the defendants. He had from the time of Mr. MacDonald's last interview or telephone call, which, according to Mr. MacDonald's testimony, was in February, 1926, a full year in which to submit his demand or bring suit. If we believe Dr. Howard's testimony that Mr. MacDonald's last call was in May, 1926, then he, Dr. Howard, had nine months in which to do so. He delayed submitting any figures until October, 1926, and then put the entire burden upon the railroad company of interviewing the doctors and examining into the question of liability. He now seeks to gain the advantage of his own delay in this respect by creating a situation which made it impossible for the defendants to fully complete their investigation until within a few days of the expiration of the statute.

If it be argued that the railroad company had two years in which to investigate the question of liabil-

ity, the answer is that they were not required to make any such investigation, at least, not until a demand had been made upon them for the payment of some specific amount.

With respect to the investigation as to the amount of damages, defendants, of course, could not do this until they had procured the names of the physicians from Dr. Howard. We do not think it amiss to remark, upon this phase of the case, that the Vice-Chancellor laid the whole burden of moving in the matter on the defendant and relieved Dr. Howard from any duty at all to move, justifying his reliance, at most, upon a statement alleged to have been made by Mr. MacDonald, and which is emphatically denied, that if he, Dr. Howard, did not employ counsel, there might be an amicable adjustment. Even if it can be believed that Mr. MacDonald made any such statement, that fact, if it be a fact, did not relieve Dr. Howard from acting promptly in submitting his demand to the railroad company. Assuming, but not conceding, that the situation was as Vice-Chancellor Leaming suggests, defendants had both a legal and moral right to expect from Dr. Howard a submission of his claim in a seasonable time. The defendant, certainly, should not be charged with his delay.

III.

Vice-Chancellor Leaming relieved the defendants of any charge of actually intending to deceive or mislead Dr. Howard. The question of actual fraud is, therefore, not in this case. It, therefore, must clearly appear that what was said or done would reasonably have the effect of inducing a claimant not to bring his suit. We submit that nothing that

was said or done in this case either could or did have any such effect:

1. Dr. Howard nowhere says that he was prevented or deterred from bringing his suit by anything that any of the defendants' employes said or did.

2. There was no request made of him that he should not bring his suit.

3. There was no statement made to him that if he did not bring his suit, an amicable settlement would be made.

4. There was no statement made to him that the defendants were liable or admitted liability.

5. There was no promise made to him that any sum of money would be paid to him in settlement of the suit.

6. Dr. Howard was not told that if he delayed in bringing his suit, that the Statute of Limitations would not be pleaded against him.

Dr. Howard says, in effect, that Mr. MacDonald told him that if he, Dr. Howard, did not employ counsel an amicable adjustment might be had. Mr. MacDonald, of course, emphatically denies this statement, as we have above pointed out, and we have a fair inference, from the testimony, that such a statement was not, in fact, made. Assuming, for the purpose of this discussion, that the statement was made, its effect, at most, is the presentation of two alternatives to Dr. Howard, viz.:

(a) To employ counsel, bring suit and take the chance of the outcome of that suit.

(b) Not to employ counsel and take the chance that an amicable settlement might be made.

It will be observed that Dr. Howard does not say that he was urged to adopt either of these alternatives.

It will be further observed that there was no request made of Dr. Howard to delay bringing suit.

The effect of the statement alleged to have been made by MacDonald as to the employment of counsel was not to delay bringing suit, but not to bring any suit.

In the case of *McKay v. McCarthy* (146 Iowa, 546, 123 N. W. 755), it appeared that the plaintiff claimed that he had been defrauded in the purchase of certain mining stock from the defendant, and brought his suit for damages therefor. The defendant pleaded the Statute of Limitations. In answer to the plea, plaintiff set up that he had been induced by the defendant not to bring his suit on the assurance that there was going to be a reorganization of the company, that new capital was coming into it, and that if suit were to be brought, it would affect the financial standing of the company. The Court held that this was not sufficient answer to the plea of the statute. At the most, it amounted to a request not to sue at all and not a request to delay suit. The Court said:

> "We are of the opinion that statements calculated to dissuade a litigant from bringing an action, not designed to induce its postponement merely, will not in the absence of fraud estop a party making them from availing himself of the

> plea of the statute in the event of subsequent prosecution of such action."

In the case of *Klass v. City of Detroit* (129 Mich. 35, 88 N. W. 204), it appeared that the plaintiff had a claim for damages against the city, upon which, under the statute, suit had to be prosecuted within one year. He presented his claim to the city council, where it was rejected. The plaintiff, however, was not informed of the council's action. After the rejection of the claim, the city council continued to take testimony with respect to it. Suit was brought after the period of limitation, and the defense of the Statute of Limitations was pleaded by the city. The plaintiff contended that these facts estopped the city from claiming the benefit of the statute. The Court said:

> "The statute is an unambiguous limitation on the right to bring an action after the lapse of a year. It was presumably known to the plaintiff and his counsel. The common council was under no obligation to take any action, and, had it pursued that policy, the plaintiff could not maintain an action not begun within the statutory period. But the council did take action, and solemnly resolved that plaintiff had no legal claim, by adopting the report of the committee. It did not notify the plaintiff, and it was under no obligation to."

Again, the Court says, after citing numerous cases:

> "It is apparent from the foregoing that the usual rules pertaining to estoppel should be applied in such cases, and that the defendant will not be precluded from availing himself of such

defense unless it can be fairly said that he is responsible for deceiving the plaintiff, and inducing him to postpone action upon some reasonably well-grounded belief that his claim will be adjusted if he does not sue. In both of the cases cited by counsel, such estoppel rested upon a promise to pay, and, in one, if not both, there was an express promise not to sue, induced by the promise to pay. As said in the Armstrong case, all of the elements of an estoppel were present. Here they were not all present. It does not appear that those assuming to act for the city knew that plaintiff was ignorant of the action of the council, or knew that the plaintiff was forbearing to sue by reason of negotiations; and there is an absence of anything in the nature of a promise to pay as a consideration for forbearance, and of anything in the nature of a recognition of plaintiff's right of action. Unless we are to say that the statute is a bar in no case when negotiations are continued beyond or renewed after the period of the statute, we cannot sustain plaintiff in his contention, and we find no case justifying so broad a rule."

From a review of the cases in our own Courts, as well as the cases above cited, it is clear that the present case is barren of any of the elements of estoppel applicable to suits of this nature. According to these cases, the test is whether the conduct of the defendant was such as to induce a reasonable person to believe that his claim would be settled and that a suit would be unnecessary to enforce his rights. There is nothing in the conduct or statements made by the defendants' employes, whether

we take their testimony or that of Dr. Howard's, which could be said to have the effect of inducing Dr. Howard to believe that his case would be settled and that a suit would not be necessary to enforce his rights. The most cogent proof of this fact is that Dr. Howard nowhere says that he believed that his case would be settled or that a suit would not be necessary.

We submit that, for the reasons above discussed, the decree in this case should be reversed and the bill of complaint dismissed.

BOURGEOIS & COULOMB,
Solicitors for and of Counsel
with Defendants-Appellants.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

ALICE O. HOWARD and J. EDGAR HOWARD,
Complainants-Appellees,

and

WEST JERSEY & SEASHORE RAILROAD COMPANY and PENNSYLVANIA RAILROAD COMPANY,
Defendants-Appellants.

ON APPEAL.

BRIEF ON BEHALF OF COMPLAINANTS-APPELLEES.

This appeal is from the final decree of the Court of Chancery enjoining the defendant railroad companies from pleading the statute of limitations in defense to an action at law in the Supreme Court of New Jersey for personal injuries caused by the alleged negligence of these defendants.

THE FACTS.

The evidence adduced at the final hearing may be stated in summary form as follows:

On February 11, 1925, the complainant, Alice O. Howard, was standing on Kings Highway in Haddonfield, N. J., near the intersection of that avenue with the tracks of the West Jersey & Seashore Railroad Company, waiting for a train of one of the defendant companies to pass. As the train passed a piece of brakeshoe was thrown off and struck Mrs. Howard in the abdomen. She was carried home in a semi-conscious condition and an examination the following morning revealed that she was suffering from a large blood tumor resulting from the injuries which she had received and which later developed into traumatic peritonitis. Thereafter she suffered from repeated hemorrhages, from inflammation of the bladder, and from an intensive tremor of the hands which was aggravated by trying to pick up anything. *S. of C., p.* 33.

The direct consequence of the accident has been to reduce her to the status of a chronic invalid with the prospect before her of a life of suffering. She was treated in the eighteen months following the accident by no less than six doctors, including her husband, the other complainant, and several distinguished specialists. *S. of C., p.* 34.

No claim is made by the railroad companies that any negligence of Mrs. Howard contributed to the accident and the circumstances surrounding her injuries make out an apparent *prima facie* case of negligence against the defendants.

A day after the accident, an employe of the claims

department of the West Jersey & Seashore Railroad Company, one Thomas J. McDonald, called on Dr. Howard, and, as the latter testified:

> "He said if there was anything they could do for us they would be glad to, and he was very anxious about her condition indeed, and he told me that they regretted that this thing occurred and that when I was ready to talk this matter over they thought we could have an amicable settlement, and he made frequent calls after that time, I have no records, as I said but he probably called on an average of once a week for quite a while, and as time went along his calls became less frequent, he called up by a phone occasionally and he told me at different times that if I did not employ counsel or get mixed up with lawyers he thought we could settle this thing amicably to the satisfaction of ourselves."

S. of C., pp. 34-5.

After his first visit Mr. McDonald called at repeated intervals at Dr. Howard's office, Dr. Howard thought as often as once a week (*S. of C., p.* 34, *line* 33), and Mr. McDonald testified at least twelve or fifteen times. (*S. of C., p.* 57, *lines* 6 *to* 8.) His visits and phone calls covered a period of fifteen months. *S. of C., p.* 48.

During the first twenty months after the accident it had been impossible to discuss settlement in view of Mrs. Howard's precarious condition. In this connection Dr. Howard testified as follows:

> "These uterine hemorrhages continued for practically 6 months, and she was unable to hold her urine for a full year or more, and I had her over to Dr. Bland again after a year or

more had elapsed and Dr. Bland came forth and said, 'Doctor Howard, we know Mrs. Howard is permanently injured, we know some of the conditions that are present, but,' he says, 'we don't know how much pathology is in that abdomen, and the only positive way to tell would be to open it up and look around,' but he did not advise it.''

S. of C., pp. 35 *and* 36.

On October 13, 1926, however (Turnbull, p. 63, Exhibit C5), the district claims agent of the West Jersey and Seashore Railroad Company, Mr. A. P. Turnbull, called, at Dr. Howard's request, at the latter's office to discuss settlement. (S. of C., pp. 36-37.) Dr. Howard asked for $10,000 and Mr. Turnbull said he would take it up and let him hear from them. In the meantime he asked and received permission to interview Mrs. Howard's doctors. (S. of C., pp. 37-8, 63-4.)

For almost four months thereafter the Howards had no word from the railroad company; then, on February 10 according to Dr. Howard (S. of C., p. 49, lines 20 to 25), or on February 9 according to Mr. Turnbull (p. 64), the latter called Dr. Howard on the telephone. The following conversation, according to Dr. Howard's recollection, then took place (S. of C., pp. 39-40):

> ''He said, 'Doctor, we have taken a good deal of time to look up this matter, we have had trouble interviewing the different physicians, getting out data, trouble to get in touch with the different physicians and getting our data, and this matter had to be referred back to the company, and so forth, and it has taken up a great deal of time, but I am in a position to make an offer today.' I told him it was all

right in regard to the time, we were in no hurry and he said, 'Doctor, I am afraid our company is not willing to offer you what you think you ought to have,' and I said, 'All right, my friend, what is the best you are going to do for us?' and he said, 'About one-fourth of that amount,' and I said, 'What do you mean, $2,500?' and he said, 'Yes'—well, I heaved a sigh, and I said, 'I don't hardly think that will do, but,' I said, 'I will take it up with Mrs. Howard and talk the matter over and I will come and see you, I will see you later, I will let you hear from me later,' something to that effect.''

(See also *Howard, p.* 50.)

Mr. Turnbull's recollection of the conversation differs only in one material point, viz: that Howard said nothing about taking up the railroad's offer with his wife, but abruptly refused the offer, whereupon Turnbull ended the conversation (S. of C., 65-66):

"Yes, the telephone call was very brief, and to my mind, to the point. After I had got him, I said to him, 'Doctor, our people will not pay the amount of money you suggested, and the only amount they will pay is one-fourth of that,' I said, 'There has been considerable delay in getting you the answer, and I wanted you to know today what their ultimatum was, and it is one-fourth of the amount you demanded,' and he said, 'That will never do, I will have to take other means,' and I said, 'If that is your desire there is nothing further for us to do,' and that was the end of the conversation.''

On February 19, eight days after the period for suit had run, Dr. Howard called at Turnbull's office

to renew discussion of settlement and, not being able to see Mr. Turnbull, called again, accompanied by Dr. Strohm, on February 24. (Strohm, pp. 51-3.) The following colloquy then ensued:

> "I said, 'Mr. Turnbull, what can you do for us,' or something to that effect, and he said, 'Doctor, as far as the company is concerned,' he said, 'the matter is over, the statute of limitations has run its course,' and I asked him what the statute of limitations was and he informed us that we only had two years' time to take action if we wanted to take any legal action, and I was sort of nonplused, but I waited a little while and I said, 'Mr. Turnbull, we were assured and reassured that we would be taken care of and that this matter could be settled amicably,' and I said, 'Now, I come here to be turned down' I said, 'It looks as though I am double-crossed,' and he said, 'Well, Doctor, I am sorry for you but it is in the hands of Broad Street,' and I said, 'Well, it looks to me as though I was treated like a darn dirty cur.' I lost my temper, it is the first time I ever did, but I calmed down, and I think Mr. Turnbull was very sorry for me, I do, indeed, he acted the part, and he said, 'Well, Doctor, I can only do one more thing for you, I can take up this matter with Broad Street and see what they will do,' and I think that ended my interview, our interview."
>
> *S. of C., Howard, p.* 41.

Mr. Turnbull did take the case up, at Dr. Howard's request, with the Pennsylvania Railroad and a two months' delay ensued before an adverse reply was received. *Howard, p.* 43. After that Dr. How-

ard took the case up direct with the railroads through one of their vice-presidents and, after waiting until July, was again told that they would do nothing for him. He then brought suit. *S. of C.*, 44-46.

The defendants, by their evidence, sought to explain and justify the four months' delay which ensued after Dr. Howard had made his proposition to them for settlement.. We will deal later with the sufficiency of the attempted explanation.

At no time during the two-year period had Dr. Howard consulted counsel, nor did he know anything of the existence of a statute of limitation. *S. of C., p.* 42, *lines* 1-10.

From the evidence thus submitted, the Vice-Chancellor found the facts set forth in his written opinion. *S. of C., pp.* 15-22. The facts so found by the Court contained all the elements of an estoppel, and under the authorities left him no alternative but to grant the injunctive relief sought.

THE ISSUE.

The appellants say that the only issue involved "is whether the conduct of the defendants prevented the complainants from bringing their suit at law within a time limited by the statute." The issue is not to be limited by use of the verb "prevented." If the record contains evidence which entitled the Court below to draw from it the reasonable inference that the complainants' failure to bring their suit within the time prescribed was mainly attributable to the conduct and representations of the defendants' agents, the decree appealed

from must be sustained. *Martin v. State Insurance Co.*, 44 N. J. L. 485, 487.

THE LAW.

In the first place statutes of limitation are—"for the benefit and repose of individuals and not to secure general objections of policy or morals." *Freeman v. Conover,* 98 N. J. L. 89, 92 (E. & A.). Accordingly there can be no objection in theory to an individual waiving his right to the protection of the statute, or estopping himself by misconduct from invoking its protection.

Relief, however, against the defense of the Statute of Limitations—where there is no express act of waiver—is not available in the law courts of our State but only in the Court of Chancery, the contrary conclusion by the Supreme Court in *Crawford v. Winterbottom,* 88 N. J. L., 588, having been recently reversed by this court in *Freeman v. Conover, supra.*

The granting of relief against the statute is commonly placed on the ground of estoppel in *pais*:

> "A debtor has frequently been held to be estopped from relying on the statute as a defense where, by acts of a fraudulent character, he has misled the creditor and induced him to refrain from bringing suit within the statutory period. And if a defendant intentionally or negligently misleads a plaintiff by his misrepresentations, and cause him to delay suing until the statutory bar has fallen, the defendant will be estopped from pleading the statute of limitations * * * It is not necessary that the

debtor should intend to mislead, but, if his declarations are such as are calculated to mislead the creditor, who acts upon them in good faith, an estoppel will be created."

17 R. C. L. 884.

In *Doughty v. Doughty,* 10 N. J. Eq., 347, 349, Chancellor Williamson stated the principle in the following words:

"It would be unconscientious for a party to plead the statute of limitations against an adversary who, at his solicitation, had been enjoined from prosecuting his suit; and it would seem to be the appropriate remedy, that the same instrument which he had used to interrupt the legal proceedings of another, should be interposed as a shield to prevent his taking an undue advantage of such interruption. One acknowledged principle, on which courts of equity give relief, is to prevent an advantage gained at law from being used against conscience."

The complainant's bill in this case was dismissed for laches.

As more simply expressed in *Lincoln v. Judd,* 49 N. J. Eq., 387 (Ch.) the right to plead the statute will be denied a defendant where ——

"It would further manifest injustice." p. 389.

In *Martin v. State Insurance Company,* etc., 44 N. J. L., 485 (S. C. 1882), the action was upon a policy of fire insurance which required that any suit thereon should be brought within six months from the date of the loss. The period of limitation was

pleaded by defendant. The court said of the evidence before it:

> "According to this evidence these negotiations continued not only through the whole period limited for bringing suit, but even after it had terminated and therefore rendered it lawful for the jury to infer that the defendant then intended not to rely on this limitation, and that the plaintiff's delay was owing to the fact that such intention was manifest, and hence that the condition was waived. * * * If the delay to bring suit is a result to which the company mainly contributed by holding out hopes of amicable adjustment, the company cannot be permitted to take advantage of the delay under the limitation clause of the policy." p. 487.

In *Clark v. Augustine,* 62 N. J. Eq. 689 (Ch. 1901) Vice-Chancellor Stevenson gave the following expression to the controlling principle of estoppel:

> "I think the right of the complainant to an injunction against the defense which the defendants have pleaded in the action at law depends on whether or not the defendants must be deemed to have wrongfully caused the complainant to make his fatal delay in prosecuting his action * * *.
>
> It seems to me that the principle running through all of the decisions above cited extends to a case like the one under consideration. In all these cases we find that the plaintiff has not intentionally or negligently allowed his time for suit to elapse, but that the defendant by his conduct in some way has brought about that re-

sult. There does not seem to be any distinction between conduct of the defendant, which has misled the plaintiff as to the existence of the cause of action, and conduct of the defendant, which has misled the plaintiff as to the time, place or manner in which the plaintiff's suit should be brought. In each case the plaintiff has not intended to allow his statutory time for suit to elapse, and in each case the defendant has misled the plaintiff into suffering that thing to occur * * *."

We may note also the decision of Judge Martin of the Essex Common Pleas in *Wright v. Smith,* 38 N. J. L. J. 234 (1915). Expiration of the one-year limitation on suit imposed by the Workmen's Compensation Act was there involved. It was shown that the claimant, wife of the injured employee, had gone to the employer who had said ——

> "I will do all I can for you and pay you Fred's wages until he is able to come to work again."

The Court held that this statement was calculated to induce the plaintiff to rely on settlement and that to enforce the statute against her would be unjust.

The appellants have sought in their brief, by excerpting part of the opinion of Vice-Chancellor Van Fleet in *Lamb v. Martin,* 43 N. J. Eq. 34, to limit relief to those cases where the complainant was actually "prevented" by act of the defendant from bringing his suit within the period prescribed. This is too extreme a test. It is obvious from a reading of the entire opinion in the case last cited that the Vice-Chancellor did not intend so to limit

relief. The complainant's suit in that case was dismissed "on her showing that the complainant lost her right of action at law not by anything the defendant did or procured to be done, *but what she did herself*" *p. 37.

The defense of the statute of limitations may be defeated either by conduct of the defendant which induces the plaintiff to neglect the bringing of suit within the prescribed period;

Clark v. Augustine, supra;
Martin v. State Insurance Co. supra.

or conduct which conceals the accrual of the right in plaintiff and the commencement of the period for suit.

Lincoln v. Judd, supra;
Holloway v. Appelget, 55 N. J. Eq. 583 (E. & A. 1897);
Freeman v. Conover, supra;
Somerset v. Veghte, 44 N. J. L. 509.

The instant case falls within the first of these classifications.

The conduct of a defendant, to raise an estoppel, does not have to be fraudulent *per se* or *wilfully designed* to mislead the plaintiff to the loss of his cause of action:

> "I do not think that the force of this misleading information is materially affected if it be conceded that there was no intention on the part of the defendant executor to mislead."
>
> *Clark v. Augustine, supra,* p. 696.

> "It seems clear that a Court of Equity will interfere, although the cause of action may not

* Where italics are used in this brief they are ours.

have arisen out of a technically fraudulent act, if the defendant has employed any means to mislead the plaintiff, or to hide from him the fact that a cause of action has arisen."

Holloway v. Appelget, supra, p. 585.

And see 17 R. C. L. 884.

There are numerous authorities in other States upholding the right to relief under such circumstances as are found in the case at bar. The leading case is *Thompson v. Phoenix Insurance Co.,* 136 U. S. 287, where the United States Supreme Court was dealing with the lapse of the period prescribed for suit in an insurance policy. The following excerpt from the opinion sets forth the facts and the holding of the Court:

"* * * While the validity of such a stipulation cannot be disputed, Riddlesbarger v. Hartford Ins. Co., 7 Wall. 386, 389, we do not doubt that it may be waived by the company. And such waiver need not be in writing. It may arise from such a course of conduct upon its part as will equitably estop it from pleading the prescribed limitation in bar of a suit by the insured. * * * The company, by its duly authorized agents, assured the plaintiff about thirty days after the fire and after the acceptance of the proofs of loss, that no question was made as to the loss or its payment, except that the company was considering the fact of the change in the receivership, and that it would undoubtedly pay the loss claimed; that as late as June 27, 1884, the premium of three hundred dollars was paid to the company, which, by its agents, again assured the plaintiff that the loss would be paid as soon as action could be taken; that after

> sixty days had elapsed from the delivery of the proofs of loss, the company, by its agents, repeatedly gave the same assurances; and that by reason of such promises and assurances he neglected, for some time after sixty days from the delivery of proofs of loss to bring suit for the recovery of the loss sustained. * * * If, as the allegations of the amended bill imply, the failure of the plaintiff to sue within the time prescribed by the policy, computing the time from the date of the fire, was due to the conduct of the company, it cannot avail itself of the limitation of twelve months. *Curtis v. Home Ins. Co.*, 1 Bissell, 484, 487; *Ide v. Phoenix Ins. Co.*, 2 Bissell, 333; *Grant v. Lexington Ins. Co.*, 5 Indiana, 23, 25; *Mickey v. Burlington Ins. Co.*, 35 Iowa, 174, 180. In the case last cited, it was properly said that it would be contrary to justice for the insurance company to hold out the hope of an amicable adjustment of the loss, and thus delay the action of the insured, and then be permitted to plead this very delay, caused by its course of conduct, as a defense to the action when brought (pp. 298-299)."

It would serve no useful purpose to cite the many cases in other States which have followed *Thompson v. Phoenix Insurance Co.*, or enforced the doctrine for which that case stands. A collection of many of these cases will be found in the editorial note to *Chesapeake Railroad Co., v. Speakman* (Ky.), 63 L. R. A. 192. Also in the editorial note to *Lynchburg, etc. v. Travelers Insurance Co.*, 149 Fed. 958, 9 L. R. A. (N. S.) 654, will be found a collection of cases on the waiver of limitation periods in insurance policies through efforts of compromise extending beyond the termination of such periods.

There should be no difficulty in the application of the doctrine of estoppel to the facts in this case. From the date of the accident the railroad companies had shown themselves solicitous for a settlement out of court of the plaintiffs' cause of action. Mr. MacDonald's constant visits and telephone calls to the Howards' home in themselves could have meant nothing else. In addition, however, he had assured Dr. Howard repeatedly that the company would make a satisfactory adjustment of the complainants' claim for damages and awaited only Dr. Howard's word to discuss with him the amount to be paid. Until October, 1926, Mrs. Howard's condition forbade negotiations. Early that month, however, Dr. Howard made a definite proposition of settlement which the railroad companies took under consideration. From the date of that offer, therefore, the situation had changed to one of negotiation for the purpose of determining the amount to be paid and this status continued until either immediately before or shortly after the expiration on February 11th of the period for suit.

At this point we have the conflict in the testimony hereinabove pointed out. Dr. Howard testified positively that he did not reject the counter-offer of the railroad companies in his telephone conversation with Mr. Turnbull on February 10th (or 9th). On the contrary, negotiations were not closed until February 24, when Mr. Turnbull first told him that the statute had run and the defendants would not deal with him. In this aspect of the case the period for suit had actually run before negotiations were terminated and the plaintiffs were disabused of the idea that the defendants really meant to settle with them, and a situation is presented in which there should be no difficulty in following *Martin v. State Insur-*

ance Co., supra, and granting the injunctive relief sought.

On the other hand, Mr. Turnbull denied that Dr. Howard had withheld a definite reply to the railroad companies' offer but insisted that his "ultimatum" had been definitely rejected by Dr. Howard on February 9th. Even assuming this to be true, does it make any difference in legal results?

The conduct of the defendant companies in either event condemns them, indeed, more so than if it had been less calculating. They keep the plaintiffs confidently waiting four months for a reply, which in the usual course of a railroad company's negotiations for settlement would have been forthcoming within a week; and then on the very brink of expiry of the statutory period for suit they deliver to Dr. Howard, in the language of Mr. Turnbull, an "ultimatum" which requires an immediate acceptance or rejection over the telephone. The calculation behind such conduct is sufficiently apparent. Mr. Turnbull, the defendant's claims agent, frankly admitted that they meant to keep within the statute, and it is further obvious, although he did not admit it in terms, that they meant to keep *just* within the statute. If they did this, complainants might fail to sue in time and defendants would be saved from liability! Their regard for the complainants' rights was measured strictly by what they thought the law would exact of them.

They kept just "within the law" and now seek to take an unconscientious advantage of this fact. Their contention, however, is urged in a Court of Equity, which acts, as Chancellor Williamson declared in *Doughty v. Doughty,* 10 N. J. Eq. 347, 349; "to prevent an advantage gained at law from being used against conscience."

Of course, what the railroad companies had in mind in springing the ultimatum of February 10th (or 9th) was to differentiate their case under the statute of limitations from those cases in which the negotiations for settlement had extended beyond the statutory period. Had their action in so doing left the plaintiffs a fair and reasonable time within which to exercise their legal rights and had the plaintiffs failed to bring suit within such time, there would have been no question to come before this Court; but it will not be seriously contended that one or two days is a reasonable time for an unsuspecting claimant to select and consult counsel, discover the requirements of the appropriate statute of limitations and to bring suit within the time therein prescribed. And is there any difference in principle between delaying tactics that carry a prospective plaintiff past the period for suit, and tactics which carry him so close to the termination of the period for suit as to leave him no fair opportunity for bringing such suit? Certainly there is not apt to be any difference in result.

The precedents in this State do not specifically cover the point of misleading conduct which ceases immediately before the expiry of the period for suit. The question, however, has come up in other States under insurance policies which, by their terms, limit the period for suit thereon. In many cases where negotiations for adjustment on a loss to the insured have carried beyond the period for suit, the Courts have held that insured had a *reasonable* time after the breaking off of the negotiations to commence his suit.

Thus, in *David v. Oakland Home Insurance Co.*, 39 Pac. 443 (Wash. 1893), the Court said of the doctrine of waiver (or estoppel) against an insurance company:

> "Such waiver would continue until by some definite action on its part, the company had notified the insured of the rejection of its claim, after which he would have a reasonable time in which to commence an action upon the policy."

A number of cases enforcing the same rule will be found in the editorial note to *Gilbert v. Globe Insurance Co.*, (Oregon, 1918) 174 Pac. 1161, 3 A. L. R. 205, 223.

Moreover, almost the very same facts which we are assuming *arguendo* were found in the case of *Magner v. Mutual Life Association*, 44 N. Y. S. 862. There the insurance company had put off the insured by assurances of settlement until *three days before the termination of the prescribed period for suit*, at which time it definitely refused to make adjustment. The Court held:

> "The provisions of the by-laws and of the policy in respect to bringing actions must be construed together, and the by-laws which provide that no action shall be maintained unless begun within six months after the death of the insured should be held to be void, as unreasonable, when attempted to be applied to a case like the present, in which the defendant delayed its final determination as to whether the claim would or would not be paid until three days before the expiration of the six months."

This decision was affirmed on appeal. 162 N. Y. 657.

The appellants' counsel have sought in their brief to distinguish this and other insurance cases by the contention that in a policy of insurance every intendment is in favor of the insured and against the insurer (appellant's brief, p. 27). We are dealing,

however, not with a question of construction of a contract or statute, where the meaning of *words* is in doubt, but with an estoppel resulting from the conduct of one of the parties in misleading the other. No reason is perceived why the doctrine of estoppel should not be as applicable to limit the exercise of a right under a statute of this character (not expressive of a public policy) as of a right arising from contract; nor do counsel for the appellants cite in their brief any cases in which such a distinction is enforced.

THE ANSWER TO APPELLANTS' POINTS.

Appellants' counsel have devoted considerable space in their brief to an analysis of the opinion filed below by the learned Vice-Chancellor. As we read that opinion, it calls for no apology or defense. Our opponents, however, complain that some of the Court's statements of the evidence submitted were not accurate, a claim which we do not feel is sustained in their brief. They must, moreover, go farther than a mere attempt to show that the Vice-Chancellor misconceived or overlooked certain minor points of testimony; their task is to satisfy this Court that the decree rendered was not supported by the evidence as a whole. It is the final decree in this case and not the Vice-Chancellor's opinion which is appealed from.

We do not, however, accept our opponents' strictures upon the opinion of the Vice-Chancellor, and shall point out in the following pages wherein we conceive the appellants' counsel to be mistaken in their attempted criticism of the opinion.

A.

Counsel first quote the statement made at the outset of the Vice-Chancellor's opinion that the testimony submitted was not in material conflict or the facts in doubt "except as to a certain telephone conversation which occurred on February 9, or 10." They then point out that there was a conflict between the testimony of Dr. Howard and Mr. MacDonald as to the latter's suggestion that Dr. Howard refrain from employing counsel. The Vice-Chancellor's reference to the testimony on this point occurs at a later place in his opinion, and he may very well have not had it in mind when, in the opening of his opinion, he made the statement above quoted as to the facts in controversy. The general language so used by Vice-Chancellor at the start of his opinion is slight foundation for the conclusion urged by appellant's counsel that the Vice-Chancellor in deciding the case had completely overlooked MacDonald's denial of Howard's testimony on this point.

Furthermore, what the Court said was that the testimony was not "in material conflict *or the facts in doubt.*" The fair assumption is that he weighed MacDonald's testimony against Dr. Howard's, rejected the testimony of the former and accepted that of the latter. Such conclusion was strictly within the province of the Court and is beyond the reach of counsel's criticism on appeal.

As to the claim (appellant's brief, p. 10) that there is no testimony justifying the Vice-Chancellor's statement that Dr. Howard understood that if he did not employ counsel the case would be amicably adjusted, we may refer, among other testimony

by Dr. Howard, to his statement (pp. 34-5) that MacDonald

> "told me at different times that if I did not employ counsel or get mixed up with lawyers he thought we could settle this thing amicably to the satisfaction of ourselves."

We feel that counsel have, in their argument, overstressed the word "could." A reading of Dr. Howard's entire testimony carries the conviction that he at all times understood from MacDonald's frequent conversations with him that the case *would* be settled amicably if he did not employ counsel.

B.

Counsel next criticise the statement by the Vice-Chancellor that "in October, 1926, Dr. Howard and Mr. MacDonald determined Mrs. Howard's condition was sufficiently defined to justify a consideration of the terms of settlement." They say that there is no testimony to justify this statement. True, there is no express testimony to this effect but the inference is a proper and irresistible one from the entire testimony of both Dr. Howard and Mr. MacDonald (quoted in part on pp. 10 to 12 of our opponents' brief) that as soon as Mrs. Howard's condition permitted it, Dr. Howard was to take up the matter of settlement with the railroad companies, and that until October, 1926, Mrs. Howard's condition had not sufficiently defined itself to justify her husband in discussing settlement. If there is inaccuracy in the Court's statement that MacDonald cooperated in Dr. Howard's determination in October that his wife's condition was such as to permit

of discussion of settlement, it is a point of minor importance, if, indeed, it has any importance at all.

The only vital point is, that prior to October, 1926, MacDonald had left the door open to the complainants to bring up the matter of settlement as soon as conditions permitted, and it is not in any way essential to the granting of relief in this case that MacDonald should have expressly agreed with Howard that this particular time was the proper time for opening negotiations.

C.

Counsel argues that there is no evidence supporting the statement by the Vice-Chancellor that from October to February, "Dr. Howard confidently awaited a reply from Mr. Turnbull." No express testimony to this effect is necessary; it was a reasonable and proper inference drawn from the testimony of Dr. Howard and Mr. Turnbull. The last thing that Mr. Turnbull said to Dr. Howard on October 8 was:

> "Well, I will take this up with the company and see what we can do for you."
> *S. of C., p.* 37, *lines* 20-22.

In view of the repeated past assurances of Mr. MacDonald, what could the complainant or any other reasonable man do but accept this statement in good faith and thereafter "confidently await a reply."

D.

In discussing the testimony as to the telephone conversation of February 10 (or 9th), counsel con-

centrate their attention to the remark by Dr. Howard that he would "have to proceed along different lines"—suggesting, of course, that he might have to start a law-suit. But they ignore entirely the words with which he concluded his reply to Turnbull, viz:

> "However, I will take up this matter with Mrs. Howard and you will hear from me later."
> *S. of C., p.* 50, *lines* 15-20

Obviously, the brusque rejoinder by Mr. Turnbull to Howard's offer of settlement prompted him to think first of suit, but his second thought, by a natural reaction, was more prudent and conciliatory and he left Mr. Turnbull with the statement that he would take up the counter offer with Mrs. Howard and let the railroad hear from him later.

This latter statement is flatly denied by Mr. Turnbull, and the Vice-Chancellor had to determine in his own mind which of the two men were telling the truth. His conclusion in this respect is scarcely open to review by this Court. Dr. Howard's testimony, moreover, is in accord with the probabilities and consistent with the ordinary reactions of human nature. The claim he was endeavoring to enforce was primarily that of the injured woman. Is it likely that he would have flatly turned down a counter offer of $2,500 without in any way consulting his wife? Dr. Howard's reply was just the reply that the average husband would have made—expressive of dissatisfaction with the counter offer, containing the hint of possible recourse to suit, but ending with the statement that he would consult his wife. It is doubtful, at best, whether any jury dealing with such testimony would have hesitated to believe Dr. Howard and disbelieve Mr. Turnbull.

The point is not in any sense determinative of the case, as even assuming that Mr. Turnbull's version of the conversation to be correct, the one (or two) days which remained to the complainants for bringing suit was not "a reasonable time" under the rule of law hereinbefore discussed.

E.

Again counsel stress the point that, because there was no precise testimony to support a finding by the Vice-Chancellor that Dr. Howard understood that the defendants' liability would not be disputed, that his opinion is not entitled to be upheld. What a man understands is generally to be inferred from the circumstances presented to his mind. MacDonald had called on him at least twelve or fifteen times, according to his own admission (S. of C., 57, lines 6 to 8), and probably more often than this, and on each visit had impressed upon Dr. Howard the fact that the case would be satisfactorily settled. Can we doubt that the complainant believed him?

Of course, the question of defendant's liability for the accident was at no time mentioned; it had been tacitly accepted by all parties. MacDonald had certainly never suggested to Dr. Howard that the railroad companies were *not* liable, and even Mr. Turnbull, in his conference of October 13, 1926, said nothing which would have conveyed to the complainants any doubt on the part of his employers as to their liability.

F.

It is scarcely necessary to discuss the point as to whether MacDonald concurred with Dr. Howard "in

the view that the amount of damages could not be adequately considered until Mrs. Howard's condition should become more clearly defined.'' If he did not expressly concur, he certainly did not contradict Dr. Howard's repeated statements that he must wait and he tacitly encouraged the latter to postpone discussion of the complainants' claims. Dr. Howard's statements to MacDonald (as quoted in appellants' brief, on page 16) were that he didn't know when he would be in position to talk settlement, and MacDonald's acquiescence clearly encouraged him to believe that the latter appreciated the necessity for postponement.

G.

Of course, the defendants' liability for the accident was never discussed. It was this very fact which naturally and properly lead Dr. Howard to understand that the railroad companies did not intend at any time to discuss or question it.

H.

The appellants' next point deals with an attempted defense of the last minute ''ultimatum'' to Dr. Howard. Counsel seek to compare the alleged delay of the complainants for twenty months in bringing up the question of settlement with the delay of the railroad companies of four months in replying to Dr. Howard's offer. Such comparison is out of the question. Dr. Howard's delay was imposed upon him by the fact of his wife's critical condition and of its uncertain prognosis by the several

specialists whom he had called in; and the necessity for such delay was explained to McDonald and acquiesced in by him. There is nothing in the record to show that Howard had any other alternative than to wait until the time he spoke. The railroad companies, on the other hand, have to justify a delay of four months which, as they claim, was necessary in order to enable them to make up their minds as to whether they should accept the complainants' offer, or if not, what counter offer they should make.

Mr. Turnbull, it is true, testified that he was in New England and New York during the greater part of this period and, therefore, was unable to get in touch with the doctors attending Mrs. Howard. But this duty would have been delegated to one of his assistants, and in the event was actually delegated to Mr. MacDonald. These five doctors were all local men and it is pressing credulity to the limit to ask a Court to believe that MacDonald was unable to interview them until "two or three months." MacDonald, p. 82, line 35.

Now, let us examine Mr. Turnbull's attempted explanation of the delay which ensued after he got back to his office in Camden on the 15th of January and first took up the matter of Dr. Howard's pending offer. From that date until, as Turnbull testifies, the 9th day of February, not a word was said to the complainants about their offer. On the 11th day of February, as Turnbull well knew and admits he knew, the period for suit expired.

> "I knew that the time for the Statute of Limitations was short and in talking it over with our solicitors we had made up our minds we would not let the statute toll against the doctor without giving him some answer * * *."
>
> *S. of C., p.* 69, *lines* 10 *to* 12.

How did they carry out this purpose?

If they had really intended to be fair to the complainants and to give them a reasonable opportunity for asserting their legal rights in court, why didn't Mr. Turnbull advise them at once? He first makes the extraordinary statement that the railroad companies had not completed their investigation of the facts surrounding the accident itself. *S. of C., p.* 69, *line* 13. This is so contrary to what we all know to be the practice of railroad companies in promptly investigating their liability for accidents that it is almost impossible to accept.

Anyway, Mr. Turnbull testified:

> "When I got back from my vacation I considered that an important case and I started right in on it and I went to our general solicitor and discussed the question of settlement.
>
> The Court: Would you mind giving me that date?
>
> The Witness: That was approximately January 15, 1927." *S. of C., p.* 71, *lines* 7 *to* 12.

The general solicitor at this conference authorized settlement at $2,500, subject only to the approval of the local solicitor in Atlantic City. *S. of C.*, pp. 64-5.

Mr. Turnbull fixed the date of his conference with the local solicitors in Atlantic City as "about two weeks before the 9th of February. *S. of C., p.* 65, *line* 9; *p.* 71, 74-5. It is clear, therefore, that there was an interval of about two weeks from the time Turnbull saw the general solicitor to his visit to the local solicitors. His only explanation of this delay was:

> "We have approximately twenty-five hundred cases a year and I simply couldn't get

> to Atlantic City any sooner, and our solicitors were not in Camden prior to that time."
> *S. of C., p.* 72, *lines* 13-17.

The result of the conferences with the local solicitor (Mr. Coulomb) was that the latter "suggested that I get some additional information, which I did," relative to the alleged latent defect. *S. of C.,* 73, *lines* 8 *to* 12. The securing of this additional information (one wonders what it could have been) took until February 8, the day on which the witness said he again interviewed Mr. Coulomb. His testimony in this respect, however, is contradicted by the answer filed in this cause which asserts that "the result of this further investigation was reported to the solicitors *on February 5, 1927.*" *S. of C., p.* 11, *line* 20. As this answer was drawn by the same local solicitors, presumably from their office records, Mr. Turnbull's testimony in this regard is seriously impugned and apparently four days passed after this final conference before the complainants were notified.

Even if we accept his testimony, it leaves much to be explained. At the supposed conference with the local solicitor on the 8th, the witness said that the former

> "asked me what I thought about it again and I said, 'I am going to give him an answer before the statute tolls, and I am going to tell him tomorrow' and he said, 'I think by all means you should do that.' "
> *S. of C., p.* 78, *lines* 6 *to* 11.

If the witness was so solicitous that the complainants should be fairly treated and advised in time of the railroad company's reply, why didn't he pick up the telephone in the solicitor's office and call Dr.

Howard in Haddonfield? The doctor, a practicing physician, could have been readily reached or a message left at his home. Instead of that, Turnbull returns to Camden and only the next morning calls Howard on the 'phone and the conversation followed which has already been set forth. Turnbull is positive about the date of the 9th, because,

> "I knew the statute was about to toll the case and I wanted him to have a definite answer before that time and I took *extraordinary precautions* to see that he got the information."
>
> *S. of C., p.* 79.

The extraordinary precautions were not to see that Dr. Howard got the information but to record the fact that it was given him prior to the expiry of the period for suit.

The witness' conduct is the more equivocal when it is borne in mind that he knew the offer would not be acceptable:

> "Q. Did you have in mind when you came back with the offer of $2500 that it would be accepted?
>
> A. I did not think he would even consider it."

If this was so, why all the time spent after January 15, on which day the witness testified he had received authority from the general solicitor to pay "as much as $2,500 in settlement." *S. of C., p.* 71, *line* 23. If the general solicitor was able from the data before him to recommend a definite figure like this, it is difficult to understand what further investigation the local solicitors could have required, or why the complainants should not have been told of this figure at once. It is obvious that the Vice-Chancellor took no stock in the witness' explanation of

the delay which ensued after January 15, and we submit it is impossible, even by giving the utmost indulgence to Mr. Turnbull's testimony, to believe that the railroad companies could not have advised the complainants of their counter proposition before February 9th.

Perhaps the most significant thing is the fact that no preliminary action was taken in regard to dealing with the offer until a few weeks before the end of the statutory period. We cannot credit the fact that Mr. Turnbull may have been out of town as sufficient to explain the delay of three months in taking up Dr. Howard's offer. On the contrary is it not evident that the railroad companies' claim agent, perceiving that the period for suit had nearly run and that the complainants, who had no counsel, were apparently ignorant of the law, felt that in duty to his employers, he should do everything possible to encourage the lapse of the complainants' rights, only taking pains to end negotiations before the expiration of the period for suit; and that in accordance with such strategy the termination of negotiations was deliberately planned and carried out in the telephone conversation of February 10 (9th), just one (two) days before the period for suit expired?

With the legal effects of this "ultimatum" no more than two days before the end of the period we have dealt elsewhere. We have sought above merely to show that the Vice-Chancellor was amply justified in applying to the conduct of the railroads' claim agent the word "unreasonable, unjust, unfair and unconscientious."

THE ELEMENTS OF ESTOPPEL.

It is clear from the record in this case that all the elements of estoppel were present and proved.

1. There were, first, the express representations which Mr. MacDonald repeated at different times to Dr. Howard that the railroad companies would satisfactorily adjust the matter if counsel were not brought into the case. The tenor of these representations was confirmed by Mr. Turnbull's taking Dr. Howard's offer under consideration in October, 1926.

2. Such representations were naturally calculated to induce the complainants to refrain from suit up to the 9th of February, 1927, at the earliest, if not to February 24 in that year. Employing counsel meant expense and a consequent reduction of the net amount to be paid the complainants. Thus was supplied an additional incentive to the complainants to rely on the declared purpose of the railroad companies' agents to effect a satisfactory settlement with them direct and without the intercession of counsel.

Whether or not the representations and conduct of the defendants' agents were calculated to induce the complainants not to bring suit at all, or only to postpone suit, seems to us quite immaterial, although appellants' counsel have stressed it in their brief (see p. 33). The representations in question were calculated to induce the complainants not to bring suit within the period prescribed and that is all that was needed to work an estoppel in this case. That

the railroad companies appreciated the misleading effect of their previous representations is evident indeed in Mr. Turnbull's testimony as to their fixed purpose to deliver their ultimatum to Dr. Howard (which they knew he would not accept) before the period for suit had actually expired.

3. Whether or not the representations were deliberately intended to induce a delay in suit throughout the period of the statute is immaterial, if such representations were calculated to and naturally had that effect. Nevertheless we feel that it is clear from the testimony that the railroad companies' agents deliberately planned to lead the complainants as close to the end of the statutory period for suit as they safely could and then hoped that, in the brief interval which they left them, no suit would be brought and the defendants thereby released from a just liability.

4. That the complainants actually believed the representations cannot be doubted, and we claim that this belief continued down to the date of February 24, 1927, when for the first time they were apprised of the expiration of time for suit, and that the railroad companies had determined to take advantage of it.

5. That the complainants were influenced by such representations to refrain from suit is obvious, and the resulting prejudice, of course, substantial.

The above are the essential elements that make out an estoppel in this case and it seems to us quite immaterial that, as pointed out on page 32 of the appellants' brief, no specific request was made of

Dr. Howard that he should not bring suit, that no statement was made to him that the defendants were liable, or no promise made to him that any particular sum of money would be paid, or that he was not told that if he delayed his suit the statute of limitations would not be pleaded against him. These were merely additional assurances which the railroad companies might have given him but which were not needed in view of the unqualified assurances by Mr. MacDonald that a satisfactory settlement would be made if the complainants did not employ counsel.

We, therefore, respectfully submit that the decree was properly entered in the above cause and that this appeal should be dismissed.

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