Index.

1346

Summons.

THE STATE OF NEW JERSEY to SAM KANENGIESER and MORRIS KANENGIESER: You Are Summoned to answer the annexed
L. S. complaint of Charles Rygiel, in an action at law in the Essex County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of the said Essex County Circuit Court, at Newark, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment entered against you.

WITNESS, William A. Smith, Esquire, Judge of the Essex County Circuit Court, at Newark, this 10th day of February, 1932.

JOHN H. SCOTT,
Clerk.

Marder and Okin,
Attorneys.

Complaint.

ESSEX COUNTY CIRCUIT COURT.

CHARLES RYGIEL, Plaintiff, vs. SAM KANENGIESER and MORRIS KANENGIESER, Defendants.	Action at Law.

The plaintiff, a resident of the City of Newark, County of Essex and State of New Jersey, says that:

FIRST CAUSE OF ACTION.

1. On or about the dates hereinafter mentioned, the defendants, Sam Kanengieser and Morris Kanengieser, were owners of the premises commonly known and designated as No. 11 Fleming Avenue, Newark, New Jersey, in which said premises Charles Rygiel, the plaintiff, was a month to month tenant of the defendants.

2. The said building contains a stairway leading towards the rear entrance of said premises, which said stairway was used in common by the plaintiff and numerous other tenants of the defendants.

3. The said stairway was used in common as aforesaid and maintained by the landlords for the purpose of affording an entrance and exit to and from the rear yard, and was in the control of the said defendants at the times hereinafter stated.

4. The plaintiff, Charles Rygiel, on or about the 20th day of May, 1931, while using said stairway to enter the rear yard, fell down same sustaining severe injuries more particularly set forth hereinafter, because of the recklessness, negligence and carelessness of the defendants.

5. It became and was the duty of the said defendants to keep and maintain the stairway in a safe condition for the use of the plaintiff and other tenants of the defendants, with which duty the defendants neglected and failed to comply; the defendants were negligent in that the stairway was maintained at a very sharp angle; in that the stairway was maintained in a loose condition and the defendants neglected to repair same; in that the said stairway was rotted and failed to have the proper supports, the defendants neglected to repair same; in that the steps were of an irregular height, all to the knowledge of the defendants.

6. As a result thereof the plaintiff, Charles Rygiel, sustained injuries in and about his head, neck, arms, stomach, legs and other parts of his person and suffered severe nervous shock, and as a result thereof will be permanently disabled in various respects.

Wherefore, plaintiff demands as damages the sum of $20,000.00 on the First Cause of Action from the defendants, Sam Kanengieser and Morris Kanengieser, together with costs of this suit to be taxed.

SECOND CAUSE OF ACTION.

1. Plaintiff repeats paragraphs 1, 2, 3, 4 and 5 of the First Cause of Action.

2. As a result thereof, the plaintiff, Charles Rygiel, sustained severe injuries, more particularly set forth in paragraph 6 of the First Cause of Action causing him to expend a considerable sum of money in endeavoring to have himself cured of the aforesaid injuries and will in the future be forced to expend considerable sums of money in order to become cured of said injuries and/or trying to become cured of said injuries.

Wherefore the plaintiff demands as damages on the Second Cause of Action, the sum of $5,000.00 together with costs of this suit to be taxed.

MARDER AND OKIN,
Attorneys of Plaintiff.

Order.

Filed November 25, 1933.

ESSEX COUNTY CIRCUIT COURT.

CHARLES RYGIEL, Plaintiff, vs. SAM KANENGIESER and MORRIS KANENGIESER, Defendants.	Action at Law.

This matter being opened to the court by Charles S. Okin, Esq., a member of the firm of Marder and Okin, Esqs., attorneys of plaintiff, in the presence of Miss Beatrice Bochner, attorney of defendants, Saul Tischler, Esq., also appearing of counsel for the defendants, and it appearing that the case has been called for trial on this day and that no jury has been impaneled nor has said trial begun; and it appearing that the attorneys of the plaintiff have made an application to amend the complaint filed herein or to file an amended complaint on the ground that the date of the accident as set forth in the complaint, to wit, on or about May 20, 1931, is erroneous, same having been inserted therein through error, and that the correct date of the accident is on or about May 21, 1930; and it further appearing that the date of the accident as set forth in the complaint is actually the result of an error; and it further appearing that the attorneys of the defendants are objecting hereto,

It is, on this 23rd day of November, 1933,

Ordered, that plaintiff be and is hereby given

leave to file an amended complaint setting forth the correct date of said accident, and that said amended complaint be served upon the attorney of the defendant within ten days from the date hereof; and it is further

Ordered, that the attorney of defendants be and is hereby given leave to file an amended answer within twenty days after service upon the said attorney of the defendants of the aforesaid amended complaint and to serve same upon the attorneys of the plaintiff within said time; and it is further

Ordered, that the parties hereto be and they are given leave to file such other pleadings as may be necessary for their respective cases, all pleadings to be filed in the same order and within the same periods as set forth in the New Jersey Practice Act except as hereinabove set forth; and it is further

Ordered, that when this cause is at issue, the matter be placed on the daily list of contested cases by the Assignment Commissioner of Essex County; and it is further

Ordered, that a new notice of trial need not be filed and that the case continue to have the same number, to wit, case No. 1228, on the list of causes for the September, 1933, term as heretofore, and until such time as a later list of causes is published; and it is further

Ordered, that defendants' request for an exception to this order be and the same is hereby allowed.

(Signed) A. O. ROBBINS,
Acting Circuit Court Judge.

A True Copy.
Marder and Okin,
Attorneys of Plaintiff.

Amended Complaint.

Filed November 25, 1933.

ESSEX COUNTY CIRCUIT COURT.

CHARLES RYGIEL, Plaintiff, vs. SAM KANENGIESER and MORRIS KANENGIESER, Defendants.	Action at Law.

The plaintiff, a resident of the City of Newark, County of Essex and State of New Jersey, by leave of court, says that:

FIRST CAUSE OF ACTION.

1. On or about the dates hereinafter mentioned, the defendants, Sam Kanengieser and Morris Kanengieser, were owners of the premises commonly known and designated as No. 11 Fleming Avenue, Newark, New Jersey, in which said premises, Charles Rygiel, the plaintiff, was a month to month tenant of the defendants.

2. The said building contains a stairway leading towards the rear entrance of said premises, which said stairway was used in common by the plaintiff and numerous other tenants of the defendants.

3. The said stairway was used in common as aforesaid and maintained by the landlords for the purpose of affording an entrance and exit to and from the rear yard, and was in the

control of the said defendants at the times hereinafter stated.

4. The plaintiff, Charles Rygiel, on or about the 21st day of May, 1930, while using said stairway to enter the rear yard, fell down same sustaining severe injuries more particularly set forth hereinafter, because of the recklessness, negligence and carelessness of the defendants.

5. It became and was the duty of the said defendants to keep and maintain the stairway in a safe condition for the use of the plaintiff and other tenants of the defendants, with which duty the defendants neglected and failed to comply; the defendants were negligent in that the stairway was maintained at a very sharp angle; in that the stairway was maintained in a loose condition and the defendants neglected to repair same; in that the said stairway was rotted and failed to have the proper supports, the defendants neglecting to repair same; in that the steps were of an irregular height, all to the knowledge of the defendants.

6. As a result thereof, the plaintiff, Charles Rygiel, sustained injuries in and about his head, neck, arms, stomach, legs and other parts of his person and suffered severe nervous shock, and as a result thereof will be permanently disabled in various respects.

Wherefore, plaintiff demands as damages the sum of $20,000.00 on the First Cause of Action from the defendants, Sam Kanengieser and Morris Kanengieser, together with costs of this suit to be taxed.

Amended Complaint

SECOND CAUSE OF ACTION.

1. Plaintiff repeats paragraphs 1, 2, 3, 4 and 5 of the First Cause of Action.

2. As a result thereof, the plaintiff, Charles Rygiel, sustained severe injuries, more particularly set forth in paragraph 6 of the First Cause of Action causing him to expend a considerable sum of money in endeavoring to have himself cured of the aforesaid injuries and will in the future be forced to expend considerable sums of money in order to become cured of said injuries and/or trying to become cured of said injuries.

Wherefore the plaintiff demands as damages on the Second Cause of Action the sum of $5,000.00 together with costs of this suit to be taxed.

MARDER AND OKIN,
Attorneys of Plaintiff.

Substitution of Attorney.

Filed December 8, 1933.

ESSEX COUNTY CIRCUIT COURT.

CHARLES RYGIEL, Plaintiff, vs. SAM KANENGIESER and MORRIS KANENGIESER, Defendants.	Action at Law.

Coult, Satz & Tomlinson, are hereby substituted in my place and stead as attorneys for the Defendants in the above-entitled cause.

BEATRICE BOCHNER,
Attorney of Defendants.

Answer to Amended Complaint.

ESSEX COUNTY CIRCUIT COURT.

Filed December 30, 1933.

CHARLES RYGIEL, Plaintiff, vs. SAM KANENGIESER and MORRIS KANENGIESER, Defendants.	Action at Law.

Defendants answering the Amended Complaint of the plaintiff herein say that:

FIRST CAUSE OF ACTION.

1. Paragraph one is denied.
2. Paragraph two is denied.
3. Paragraph three is denied.
4. Paragraph four is denied.
5. Paragraph five is denied.
6. Paragraph six is denied.

FIRST SEPARATE DEFENSE TO FIRST CAUSE OF ACTION:

Plaintiff, Charles Rygiel, caused or contributed to his alleged injuries in that he failed and neglected to exercise reasonable care to protect his own safety under the circumstances and conditions which existed at the time of the alleged accident.

SECOND SEPARATE DEFENSE TO FIRST CAUSE OF ACTION:

Defendants allege that the plaintiff's injuries resulted from a risk voluntarily assumed by him, and the existence, nature and danger of which were patent to and understood and appreciated by him or ought reasonably to have been.

THIRD SEPARATE DEFENSE TO FIRST CAUSE OF ACTION:

Defendants aver that the cause of action alleged in the complaint and amended complaint of the plaintiff did not arise within two years next preceding the commencement of this action and by virtue of the Statute of Limitations in such case made and provided plaintiff is barred and precluded from having and maintaining the alleged action set forth in the said complaint and amended complaint.

SECOND CAUSE OF ACTION.

1. Defendants repeat the answers to paragraphs 1, 2, 3, 4 and 5 of the First Cause of Action and make same part hereof as if herein set forth in full.

2. Paragraph two is denied.

FIRST SEPARATE DEFENSE TO SECOND CAUSE OF ACTION:

Plaintiff, Charles Rygiel, caused or contributed to his alleged injuries in that he failed and neglected to exercise reasonable care to protect

his own safety under the circumstances and conditions which existed at the time of the alleged accident.

SECOND SEPARATE DEFENSE TO SECOND CAUSE OF ACTION:

Defendants allege that the plaintiff's injuries resulted from a risk voluntarily assumed by him, and the existence, nature and danger of which were patent to and understood and appreciated by him or ought reasonably to have been.

THIRD SEPARATE DEFENSE TO SECOND CAUSE OF ACTION:

Defendants aver that the cause of action alleged in the complaint and amended complaint of the plaintiff did not arise within two years next preceding the commencement of this action and by virtue of the Statute of Limitations in such case made and provided plaintiff is barred and precluded from having and maintaining the alleged action set forth in the said complaint and amended complaint.

COULT, SATZ AND TOMLINSON,
Attorneys for Defendants.

Reply to Answer to Amended Complaint.

Filed January 2, 1934.

ESSEX COUNTY CIRCUIT COURT.

CHARLES RYGIEL, Plaintiff, vs. SAM KANENGIESER and MORRIS KANENGIESER, Defendants.	Action at Law.

Plaintiff denies all the separate defenses in the answer to amended complaint.

MARDER AND OKIN,
Attorneys of Plaintiff.

Testimony.

ESSEX COUNTY CIRCUIT COURT.

CHARLES RYGIEL,
Plaintiff,
vs.
SAM KANENGIESER and MORRIS KANENGIESER,
Defendants.

Before: Hon. John C. Losey, J., and a jury.

Newark, N. J., Jan. 23, 1934.

Appearances:

Messrs. Marder & Okin, attorneys for plaintiff, by Aaron Marder, of counsel.

Messrs. Coult, Satz & Tomlinson, attorneys for defendants, by Joseph Coult, of counsel.

Mr. Marder opens for the plaintiff and Mr. Coult for the defendants.

Mr. Marder: I take it from Mr. Coult's opening that the ownership of the premises is admitted?

Mr. Coult: There is no question about that; yes.

The following witnesses were called for the plaintiff, examined by Mr. Marder, and cross-examined by Mr. Coult:

Mary Rygiel, William Cooperman (no cross-examination), Charles Rygiel, Walter Rygiel, John Surjbersuis, Samuel M. Goldstein, Helen Murphy, Stephen Skuba.

PLAINTIFF RESTS.

Motion for non-suit by Mr. Coult.

Mr. Coult: At this time I move for a non-suit on the ground that the present cause of action which we are litigating here is barred by the Statute of Limitations.

The Statute of Limitations has been pleaded in the amended answer. The history of this case is as follows: A suit was brought in February, 1932, in which it was alleged that an accident of the same type as this one had taken place in May, 1931. Subsequently an application was made to the Court to amend the complaint by setting up a cause of action based upon a similar accident, which is this one alleged to have occurred in the year 1930. That was the institution of a new cause of action, and when that cause of action was instituted, the Statute of Limitations had run as to that accident.

Now the cases are clear that an amendment which sets up a cause of action for the first time is in effect the institution of a suit, that the Statute of Limitations can be pleaded to it. The only question for your Honor to decide is whether or not the cause of action alleged by the amendment is a new cause of action or a mere restatement of a cause of action already pleaded.

It is our contention, and we make it in all seriousness and in the belief that we are correct in our view of the law, that the Statute of Limitations has barred this cause of action, for this reason: The purpose of the Statute of Limitations is to protect a defendant from the necessity of going back more than a reasonable period to meet any cause that is alleged against him. Witnesses die and become dispersed. Evi-

dence of various kinds, aside from the testimony of witnesses, becomes less available as time passes. Therefore there has been the rule of law comparable to the rule of laches in equity, which limits the time within which a suit in fairness and in justice may be brought after the cause of action has accrued.

Now your Honor can see the result that has been effected in this present case. These defendants are charged with having by their negligence caused an injury in the year 1931. There is no difficulty in meeting that allegation. It is perfectly clear, we will say for the purpose of argument—I do not know what the situation may have been, but for the purpose of argument we will say that having no fear at all with regard to such a cause of action as that, because they can establish beyond contravention that no such accident happened at that time.

Time passes; the case is prepared, and they come to court ready and armed with proof to show that that accident did not happen. Now at that juncture the plaintiff says, We have made a mistake here, or been misadvised; we want to shift the date of this back one year. That puts it at a time, when that particular cause of action is first asserted, more than two years after the date that the cause accrued.

Now that raises an entirely different question, and one that the statute itself is primarily designed to protect one from; that is to say, it is not the cause of action of 1931, the one that the defendant is ready to meet, the one to meet which he has interviewed witnesses and prepared his case, but one of the year previous, where he may never be able to get witnesses

* * *

Mr. Marder: There are three answers to Judge Coult's motion, one is that this question so far as this Court is concerned is *res adjudicata.*

A motion to amend the complaint was made before Judge Robbins, when this came up for trial in November of last year, and this matter of stating a new cause of action was fully argued before Judge Robbins and Judge Robbins made the following order * * *

The amended complaint was filed and the amended complaint set forth exactly the same cause of action as the original complaint set forth except that the date is fixed on or about May 21st, 1930, instead of May 20th, 1931.

I say this application having been fully heard before Judge Robbins it is the law of the case as far as this trial is concerned, and if not, the Appellate Court can correct that error. I do not believe that it is within the power of the Trial Court now to correct or to reverse Judge Robbins after permitting this amendment.

Secondly, the power of amendment is very broad, much broader than that indicated by the Supreme Court in the Casavelo case, 12 Misc. P. 81. I am quite sure that the Supreme Court in that case is stating the law followed by our Court of Errors and Appeals; and in saying that I have in mind the case of Thompson, 91 Law, P. 160; an opinion before the Court of Errors and Appeals by Chancellor Walker * * *

For these three reasons I think the motion ought to be denied.

Mr. Coult: Counsel has cited two classes of cases with which we have not the slightest quar-

rel whatever, that have absolutely no bearing on what we are talking about. The first class are those which say that an entirely new cause of action can be set up by amendment. That is true and has been true for years. But if a new cause is raised by amendment you cannot plead the Statute of Limitations to it because it is subject to any defense that is then available. I could come into court, for instance, with a cause of action in which I said that within two years the defendant was negligent, and that he ran over me with an automobile. I come into court and say I have misstated my cause of action; I want to change it. I want to say that the defendant hit me with a club; and this cause of action arose within two years, and the Court would say, Of course there is ample authority for it; you have the right within any court, and if you have misstated your cause of action you can state an entirely different cause of action. But if somebody comes into court and says, Somebody ran over me within the last two years with an automobile; I want to amend; I want to set up a new cause of action, but I want to set it up as having occurred two years ago.

The Court can say, Are you going to plead the Statute of Limitations to this? Yes. It is perfectly idle ceremony for me to permit this amendment if you are going to plead the statute. Or he may say, I will allow this amendment, but as soon as the amendment is made, the defendant is going to plead the statute. That is what Judge Robbins did in the present case.

You cannot amend to set up the Statute of Limitations. It is not a plea that is not avail-

able if you once neglect to assert it; and it is not a defense that can be raised without a pleading, and some people might not plead the Statute of Limitations but what Judge Robbins has done is to say, Yes, you can set up your new cause of action and I will leave it to the pleader to say whether or not he is going to plead the statute, but if he pleads the statute it is going to be right. But that is not his concern * * *

Now that is one of the classes of cases, and the other classes distinguish between what is and what is not a new cause of action. They say the place in which a person may have been injured is not the gist of the action. They say that a pleader may, if he finds himself embarrassed, restate his cause of action by amplifying it or by changing the most unessential things. The date, as far as the Statute of Limitations is concerned, is the one important thing. If any one brings a suit and alleges a date, which on the face of it would be one against which the Statute of Limitations would run, the Statute of Limitations is a good pleading to that complaint.

Here is a case where a suit is started alleging an accident to which the Statute of Limitations would not be a bar. When you get to the point of trial a cause of action similar in its effect but happening on another date is set up, to which the Statute of Limitations would be a bar; and if your Honor is going to say that the pleading is not good, then the statute is emasculated, because I could come into court with any kind of case and say to the Judge, I have made a mistake; it didn't happen on that

date, but the Court would say, if he alleged that, the date would be a bar.

Then you say that the date is not the gist of the accident; I am setting up the cause of action which I am going to try. I am not changing the cause of action; the only difference is that it happened two years ago and not when I originally stated. That makes the Statute of Limitations a mere formality and a mighty empty one. How is one going to avail himself of it if lawyers by tactics of that kind can evade the effect of it?

I concede that amplifications or a restatement of your original cause of action is not the setting up of a new cause of action; but when you change the date, particularly if you put it at a time when the statute would have run, you are not only pleading a different cause of action but another accident.

There was a letter addressed by the present attorneys to the former attorney of the client I represent as late as the 15th of June, 1933. You see up to that time we never knew what defense we had to prepare—

Mr. Marder: I knew nothing about that letter. If the Court please, in the first place, so far as this order is concerned of Judge Robbins, the manifest purpose of it was to permit the amendment and allow the defendants their exception, because it says, "It further appears"

* * *

So far as the order is concerned, it is the law of this case. Judge Robbins has listened to this argument and decided that the amendment was not barred by the statute.

The Court: Not unless it is pleaded.

Mr. Marder: Even so the point was made that the statute barred the amendment and he held that the amendment would be permitted, and that, in his opinion, the statute did not bar the amendment.

Mr. Coult: All he allows is the amendment

* * *

I will concede for the purposes of this action that the case is the original cause of action intended to be tried when the summons was issued and the complaint filed, and that we are now trying that same case, but the difficulty with it is that we were not apprised of that accident and intention to try it more than two years after that cause of action had accrued. That simplifies it.

The Court: I think in this case that it is a different cause of action and I will grant the motion for a non-suit.

Mr. Marder prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Judgment.

59544

ESSEX COUNTY CIRCUIT COURT.

CHARLES RYGIEL, Plaintiff, vs. SAMUEL KANENGIESER and MORRIS KANENGIESER, Defendants.	Action at Law. Trial Non-Suit by Order of the Court. Judgment entered January 24, 1934. Costs $90.90 —Defts. Judge Losey.

Coult, Satz & Tomlinson, Attys. for Deft. By Substitution.

Judgment on Non-suit by Order of the Court in the above-entitled action was rendered on the Twenty-fourth day of January A. D. Nineteen Hundred and Thirty-four in favor of the defendants Samuel Kanengieser and Morris Kanengieser and against the plaintiff Charles Rygiel for the sum of Ninety Dollars and Ninety Cents Costs of Suit.

Judgment Signed and Entered January 24, 1934.

Supreme Court Transcript issued February 21, 1934, Book 8, page 238.

Book 121, page 120, Circuit Court Judgments.

Notice and Grounds of Appeal.

Filed August 9, 1934.

ESSEX COUNTY CIRCUIT COURT.

CHARLES RYGIEL, Plaintiff, vs. SAM KANENGIESER and MORRIS KANENGIESER, Defendants.	Action at Law.

To:
Coult, Satz & Tomlinson, Esqs.,
Attorneys of Defendants,
Military Park Building,
Newark, New Jersey.

Take Notice that plaintiff appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in this cause upon the following grounds:

1. The trial court directed a judgment of non-suit against the plaintiff and in favor of the defendants and was thereunto moved by counsel of the defendants, whereas said court should have denied said motion.

2. The trial court erred in directing said judgment of non-suit.

3. The plaintiff's cause of action was not barred by the Statute of Limitations.

4. The suit was instituted by plaintiff within the period of the Statute of Limitations.

5. The amendment to the complaint did not set up a new cause of action.

6. An amendment to a complaint setting up a new cause of action is not barred by the Statute of Limitations even though the statutory period has run before the amendment was made.

Dated, August 7th, 1934.

MARDER AND OKIN,
Attorneys of Plaintiff.

Due and legal service of the within Notice and Grounds of Appeal hereby acknowledged this 7th day of August, 1934.

COULT, SATZ & TOMLINSON,
Attorneys of Defendants.

New Jersey Court of Errors and Appeals

CHARLES RYGIEL, Plaintiff-Appellant, vs. SAM KANENGIESER and MORRIS KANENGIESER, Defendants-Respondents.	Action at Law. On Appeal from Essex County Circuit Court.

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT.

This is on appeal from the judgment in favor of the defendants entered upon non-suit (p. 23).

Statement of Facts.

The suit was instituted on February 10, 1932 (summons, p. 1), and the original complaint (pp. 2-4) counted upon the negligence of the defendants in maintaining a certain stairway, alleging further that the accident happened on or about May 20, *1931*. The case came up for trial before Judge A. O. Robbins on November 23, 1933, and it being represented to Judge Robbins that the date of the accident as alleged in the complaint was erroneous and inserted therein through error, and that the correct date of the accident was on or about May 21, *1930*, he made an order dated November 25, 1933,

which, amongst other things, permitted the plaintiff to file an amended complaint setting forth the correct date of the accident and allowing the defendants an exception to said order (pp. 5 and 6). Whereupon plaintiff filed an amended complaint on November 25, 1933 (pp. 7-9), which is word for word like the original complaint, except that the date of the accident is given as "on or about the 21st day of May, 1930," instead of "on or about the 20th day of May, 1931"; and the defendants answered said amended complaint (pp. 11-13) by way of denial, and pleaded separate defenses, the third of which set up the statute of limitations, and reads as follows:

> "Defendants aver that the cause of action alleged in the complaint and amended complaint of the plaintiff did not arise within two years next preceding the commencement of this action and by virtue of the Statute of Limitations in such case made and provided plaintiff is barred and precluded from having and maintaining the alleged action set forth in the said complaint and amended complaint."

Plaintiff's reply denied the separate defenses (p. 14).

At the trial plaintiff put in his case and proved that the accident happened on May 21, *1930*, and upon the plaintiff's resting, defendants' counsel moved for a non-suit on the sole ground that the action was barred by the statute of limitations for the reason that the amendment was more than two years after the happening of the accident (pp. 15-22).

Plaintiff, on this appeal, abandons one of the

arguments made on the motion for non-suit (p. 18), to wit, that Judge Robbins' order in permitting the amended complaint on November 23, 1933, made the law of the case which was binding on the Trial Court until reversed by an appellate court; the reason for this abandonment is that this proposition of the law of the case, although an interesting one, nevertheless would be of no practical avail to plaintiff if this Court on a subsequent appeal held that the action was barred by the statute of limitations.

It is respectfully submitted, however, that the action was not barred by the statute of limitations for the reasons argued below.

The testimony of plaintiff's eight witnesses is not printed in the state of case. The transcribing and printing of this testimony would have been rather costly, and an unnecessary expense, since clearly, this testimony is not needed for the determination of the legal questions involved in this appeal.

POINT I.

Changing the date of occurrence of an accident by amendment is not setting up a new cause of action.

(a)

The argument of defendants' counsel, substantially, was that an amendment giving a date other than the original date set up a new cause of action which was barred by reason of the

statute of limitations, and in support of his contention cited but one case, to wit, the case of *Casavalo v. D'Auria,* 12 Misc. p. 81, where the Trial Judge, after the statutory period of limitation ran, permitted plaintiff to amend his complaint wherein he originally charged *negligent maintenance* so that the amended complaint charged *negligent making of repairs,* and in that case the opinion of the Supreme Court in reversing the Trial Court, and in so far as pertinent, reads as follows on pages 82-83:

> "This case seems to fall within the rationale of the decision of our court of the last resort (in affirming for the reasons expressed in the opinion below), in *O'Shaughnessy v. Bayonne News Co.,* 9 N. J. Mis. R. 345; 154 Atl. Rep. 13; affirmed, 109 N. J. L. 271; 160 Atl. Rep. 696, holding that 'an amendment will not as a rule be held to state a new cause of action if the facts alleged show substantially the same wrong with respect to the same transaction, or if it is the same matter more fully or differently laid, or, if the gist of the action or the subject of controversy remains the same; and this is true although the form of liability asserted, or the alleged incidents of the transaction may be different.' The charge in the amended complaint is not substantially the same wrong with respect to the same transaction as that stated in the original complaint. It is not the same matter more fully and differently laid, but it is rather a different matter—a different cause of liability. Nor can it be said that the gist of the action or the subject of the controversy is the same. Bouvier's Law Dictionary defines 'gist' as 'the essential ground or object of the action in point of law, without which there would

> be no cause of action; the cause for which an action will lie; the ground or foundation of a suit, without which it would not be maintainable; the essential ground or object of the suit without which there is no cause of action.'
>
> "In the instant case, the gravamen of the original complaint was the breach of an alleged duty *to maintain the stairway* in a reasonably safe condition, while the gist of the cause of action pleaded in the amended complaint is *the negligent performance* of an assumed duty to make repairs. It therefore follows that there was error in permitting respondent to amend the complaint in the manner indicated.
>
> "Judgment reversed." (Italics ours.)

The following is from the opinion in the *O'Shaughnessy* case by Judge Ackerson on pages 347-348, where he held that the amendment discussed did not set up a new cause of action and was not barred by the statute:

> "In a tort action an amendment may vary the statement of the original complaint as to the manner in which the plaintiff was injured, or as to the manner of the defendants' breach of duty, without necessarily setting up a new cause of action. 49 C. J. 316, Sec. 679 (see cases cited in footnotes); *Swank v. Pennsylvania Railroad,* 94 N. J. L. 552; *Duffy v. McKenna,* 82 *id.* 62; *Giardini v. McAdoo, supra; Miller v. West Jersey, &c., Railroad Co.,* 76 *id.* 282; *Seaboard Air Line v. Renn,* 241 U. S. 290; *Texas and Pacific Railway v. Cox,* 145 *id.* 593; *Missouri, Kansas and Texas Railway Co. v. Wulf,* 226 *id.* 570; *Hermecken v. Seaboard,* 239 *id.* 353; *Ingwerson v. Chicago, &c., Railroad Co.,* 150 Mo. 374; 130 S. W. Rep. 411.

> "In the case *sub judice* the injury charged in the original complaint was alleged to have arisen out of the negligent operation of defendants' automobile. *The place where the plaintiff was injured is not the gist of the cause of action. Whether he was injured while alighting from the automobile or while passing in front of it, are mere incidents of the wrong done; the subject of the controversy remains the same and the gravamen of the complaint, the real wrong done, was the negligent operation of the automobile. It makes no difference to the cause of action that in the first instance the plaintiff may have been an invitee in the car, and in the second a pedestrian in the street. The duty required of the defendants, and the degree of care exacted in each instance was the same, and in either event there could be no cause of action, unless the car was improperly operated by the owner's agent.*" (Italics ours.)

In *Scott v. Schisler,* 107 N. J. Law, page 397, the late Chief Justice held that an amendment after the statutory period of limitation was proper, where the original complaint alleged that the master was driving the car in question, and in the amendment, that a servant was driving the car in question. The late Chief Justice says on page 400 as follows:

> "Lastly, it is argued that the trial judge erroneously permitted an amendment of the pleadings at the close of the trial by inserting in the complaint a statement that in the operation of the automobile Scott was the servant and agent of young Schisler, the original averment being that the automobile was being driven by Schisler. It is said that

> by permitting this amendment the complaint sets out a new cause of action, which is barred by the statute of limitations. No authority is quoted for any such assertion, and our own decisions negative it."

In *Rollins v. Atlantic City Railroad Co.*, 73 N. J. Law, page 64, the suit was to recover damages for loss of timber alleged to have been burned through the negligence of the defendant's servants. The following is from the opinion by Mr. Justice Reed on page 75:

> "It is assigned as another reason that inasmuch as the declaration lays the date of the fire as April 1st, it follows that testimony that the fire in question occurred on April 29th was erroneously admitted, over an objection.
>
> "*The date was laid under a videlicet, and the defendant was not required to prove that the fire occurred on the precise date alleged.*
>
> "If, as insisted, this rule works harshly if enforced in actions of this kind, the court could relieve against the harshness only by a continuance of the cause in case of manifest surprise arising from the variance in dates. *There was, however, no surprise in this instance, for the cause had been already once tried, and on the former trial the 29th of April was fixed by the witnesses as the date when the fire occurred.*" (Italics ours.)

The word "videlicet" is defined in Black's Law Dictionary, Second Edition, on page 1207 as follows:

> VIDELICET. Lat. The words "to-wit," or "that is to say," so frequently used in pleading, are technically called the "videlicet" or "scilicet"; and when any

> fact alleged in pleading is preceded by, or accompanied with, these words, such fact is, in the language of the law, said to be "laid under a videlicet." The use of the videlicet is to point out, particularize, or render more specific that which has been previously stated in general language only; also to explain that which is doubtful or obscure. Brown. See *Stukeley v. Butler,* Hob. 171; *Gleason v. McVickar,* 7 Cow. (N. Y.) 43; *Sullivan v. State,* 67 Miss. 346; 7 South. 275; *Clark v. Employers' Liability Assur. Co.,* 72 Vt. 458, 48 Atl. 639; *Com. v. Quinlan,* 153 Mass. 483, 27 N. E. 8.

Clearly then, since the purpose of the videlicet is to make more specific or certain, and since it is held in the *Rollins* case that the date made specific therein by the videlicet was not of the gist of the action, but that the plaintiff, although having alleged the date of the fire as of April 1, could prove that the fire occurred on April 29, almost one month later, it clearly must follow that the date of an accident is not the gist of an action, that the gist of the action in the case at bar is the negligence of the defendant in maintaining the stairway, and that the plaintiff was injured because of said negligence and what the actual date of the injury was is of no consequence, so far as the gist of the action is concerned. As pointed out in the *Rollins* case, all that the defendants are entitled to, is not to be surprised at the actual trial. In the case at bar, the defendants were not surprised at the actual trial; they were informed on November 23, 1933, when the case first came up for trial, of the mistake in the date. They clearly had sufficient time to properly prepare their case on the basis of the

amended date. Moreover, neither the original nor the amended complaint specifically state the accident to have occurred on any particular day; they both state that the accident occurred "on or about" a certain stated date; clearly, if it is permissible to prove the occurrence of a fire on April 29, when the declaration in the suit specifically alleges that the fire occurred on April 1, it should be permitted the plaintiff to prove an accident no matter when it occurred, when the complaint states that it occurred "on or about" a certain date, providing, of course, that the suit was actually instituted within two years before the accident actually occurred, and this, under the *Rollins* case, is permissible even without a formal amendment. All of which goes to demonstrate that the date of the occurrence of the accident is not of the gist of the action and that an amendment in the date does not set up a new cause of action.

Defendants' counsel, in his argument for a non-suit cited no case where it is held that a change of the date constitutes a new cause of action. Plaintiff's counsel has made a diligent search and has been unable to find any case which so holds. He has found, however, quite a number of authorities outside of this state which directly hold that a change in the date does not set up a new cause of action. The following is from 37 Corpus Juris, pages 1071-1072, under the heading "Limitations of Actions":

> "(Sec. 508) (2) Making Allegations More Specific. Where plaintiff by amendment sets up no new matter or

> claim, but merely restates in a different form, *more correctly* and specifically, or more clearly and concisely, the same cause of action set out in the original declaration, *or merely declares that through mistake the time is erroneously stated in the original pleading, it is not a new suit, and the statute will not avail for the period between the original and amended pleadings.*" (Italics ours.)

See also the notes of cases from various jurisdictions cited, particularly *Levin v. V. Clad and Sons, Inc.*, 244 Pa. 192-197, 90 Atl. 570, where the first headnote reads as follows:

> "In an employee's action for injuries, an amendment to the statement of claim averring that the accident happened April 26th, instead of April 22nd, did not set up a new cause of action, and hence could be made after the statute of limitations had run, without plaintiff filing a new declaration, and defendant being ruled to file a new plea."

In *Andrews v. Marsden,* 278 Pa. 56, 122 Atl. 171, 29 A. L. R. 636, the third headnote reads as follows:

> "3. A complaint may be amended so as to substitute a correct date for the occurrence of the act complained of for the incorrect one alleged, even though the Statute of Limitations has run, since the cause of action is not thereby changed."

The following is from the opinion on page 638 of 29 A. L. R.:

> "To conform to the testimony plaintiff proposed to amend his statement of claim (1) by changing the date of the wrongful distraint from March 5, 1912, to

> February 2, 1912; and (2) to recover for an alleged illegal distraint under landlord's warrant. The court refused both amendments. The substitution of the correct date of the commission of the act did not change the cause of action, and the amendment in this respect was improperly refused. *Levin v. Clad & Sons,* 244 Pa. 194, 197, 90 Atl. 570; *Rock v. Cauffiel,* 271 Pa. 560, 563, 115 Atl. 843."

The following is from the report of *Columbian Three Color Co. v. Aetna Life Insurance Co.,* 183 Ill. 384, as given in 83 A. L. R., pages 762-763:

> "The original declaration, filed before expiration of the designated period, made no averment of a consideration, and averred that the suit was brought on a policy executed and delivered November 14, 1907, covering a period of twelve months, from November 14, 1907, to November 14, 1908; the amended declaration, filed after expiration of the designated period, averred a consideration, and averred that the suit was brought on a policy issued November 10, 1906, covering a period of thirty-six months, from November 10, 1906, to November 14, 1909; except for these averments of a consideration, and of different dates stated in describing the policy sued upon, the amended declaration was substantially the same as the original declaration. It appeared from the pleadings that only one policy was issued by defendant insurer to the assured and in force at the time of the accident, and that this was the policy referred to and described, although differently as to the dates thereof, in each of the two declarations. It was held that the original declaration stated a cause of action, although but defectively, be-

cause making no averment of a consideration; that the amended declaration set up the same cause of action, and not a new and different one, although averring different dates in describing the policy sued upon; *and therefore, that the amended declaration was not subject to a plea of the Statute of Limitations, or of the contract limitation.*" (Italics ours.)

The following is from 49 Corpus Juris, pp. 515-516, under the heading "Pleading":

"(Sec. 678) ddd. Remedying Defects in Statement. While, as has been noted, where plaintiff's original pleading fails to disclose a cause of action or shows that he has no cause of action, the defect is ordinarily regarded as not amendable, *an amendment which merely remedies a defective statement of a cause of action is not regarded as setting up a new or different cause of action,* and so long as the contract or wrong originally declared upon as adhered to may be permitted in actions either of contract or tort, an amendment changing the alleged date of a contract, or the sum to be paid, or any particular of the matter to be performed, or the time or manner of performance, does not, in the accepted meaning of the phrase, change the cause of action. *So, in actions of tort, amendments have been permitted as to such matters as dates, place, or other matters of description.* So, where the identity of the particular land in controversy is unchanged, errors in description may be corrected by amendment." (Italics ours.)

See also cases cited in the notes.

(b)

It is evident, consequently, that all the authorities obtainable, hold that a change in the date does not set up a new cause of action. And the defendant is not in any way harmed thereby; he is still protected by the statute in that the cause of action actually proved, must have accrued within the statutory period of the institution of the suit. The statute of limitations is a statute of repose. In so far as personal injury actions are concerned, it reads as follows (3 Comp. Stat., p. 3164, Sec. 3, under the heading "Limitation of Actions"):

> 3. Two years limitations.—Every action upon the case for words shall be commenced and sued within two years next after the words spoken and not after, and that all actions hereafter accruing for injuries to persons caused by the wrongful act, neglect or default of any person or persons, firm or firms, individual or individuals, corporation or corporations within this state, shall be commenced and instituted within two years next after the cause of such action shall have accrued and not after (Rev. 1877, p. 594, as amended P. L. 1896, p. 119).

Its purpose is to put an end to claims between men.

By way of illustration, the statutory periods for different causes of action vary. For example, under Section 1, the period for an action of trespass is six years. Under Section 16, the period for an action on a bond is sixteen years, etc. That any argument about loss of evidence is not sound, is illustrated by the

difference in the statutory periods. For example, payment on a bond without any receipt therefor having been given, might have been made fifteen years before the institution of suit. That clearly is subject to a greater charge of possible loss of evidence than that argued by defendant's counsel at the trial. *If the claim is made within the statutory period, the defendant knows thereof in time.* He is apprised of the cause of action and that is all he is entitled to. If, at the trial, a defendant be surprised by the date being different from that alleged in the original complaint, his sole remedy is to obtain a postponement of the trial. Nor is the statute defeated by such a rule, as argued by defendants' counsel on the motion for non-suit; all the statute requires is that the suit must be instituted, in personal injury cases, within two years after the accrual of a cause of action; in other words, the institution of the suit fixes for once and for all both termini of the statutory period, and therefore, the defendants receive the full benefit of the statute and its purpose ~~of~~ is not in any way defeated by allowing an amendment as to the date of the accrual of the cause of action. So long as the date of the actual accrual is within two years of the institution of suit, the statute of limitations does not bar the suit.

POINT II.

~~(a)~~

Under Section 24 of the 1912 Practice Act, the Court may permit an amendment setting up a new cause of action, even though the statutory period has run before the amendment is requested. (a)

This is clearly intimated by Judge Ackerson in *O'Shaughnessy v. Bayonne News Co.*, 9 Misc. p. 345, where he says on pp. 346-347 as follows:

> "The accident happened on February 25th, 1928, and the two-year statutory period of limitation ran against the plaintiff's cause of action on February 25th, 1930, more than eleven months prior to this application to amend.
>
> "As was said by the late Mr. Justice Katzenbach, in the case of *Wilson v. Dairymen's League Co-operative Ass'n*, 105 N. J. L. 190:
>
> "'In the early days of our jurisprudence, many actions were brought to a summary conclusion by reason of mistakes as to form. These decisions resulted frequently in miscarriages of justice. The only meritorious result of dismissing suitors on technicalities was to create a bar adept in the science of pleading. *For many years the trend has properly been in the other direction. The aim of courts and legislatures is to abolish technicalities and enable suitors to have the merits of their controversies fully tried.*'
>
> "It may be that under Section 23 and

> *24* of the supplement to our Practice Act of 1912 (Pamph. L. 1912, p. 381), which confers upon the court the power to permit 'before or at the trial the statement of a new or different cause of action in the complaint or counterclaim,' *that this proposed amendment may be made whether it states a different ground for the action or not. Giardini v. McAdoo,* 93 N. J. L. 138, at bottom of page 148. But it is unnecessary, as I conceive it, to rest the determination of this motion upon any such consideration, for I do not consider that the proposed amendment substantially changes the plaintiff's claim." (Italics ours.)

Section 24 of the 1912 Practice Act, which is much later in point of time than our statute of limitations, reads as follows:

> "Sec. 24. In addition to the present powers of amendment, the court may, upon terms, permit, before or at the trial, the statement of a new or different cause of action in the complaint or counterclaim."

In *Thompson v. Peppler,* 91 N. J. Law p. 160, the late Chancellor Walker in discussing for this court, Section 24 of the 1912 Practice Act, says on p. 161 as follows:

> "*It will be observed that there is in the act no limitation whatever upon the power of amendment, but that power is given to permit the statement of a new or different cause of action.*" (Italics ours.)

In *Guild, Ex'r, v. Parker, Rec'r,* 43 N. J. Law p. 430, decided by this Court, the first headnote reads as follows:

> "1. An amendment within the power of the court to allow, is not the beginning of a new action, so as to subject the suit to the operation of the statute of limitations, which was not a bar at the time of instituting the action."

Clearly then, since it is within the power of the Court to permit an amendment setting up a new cause of action, and since an amendment within the power of the Court to allow is not the beginning of a new cause of action, Courts may now, under Section 24 of the 1912 Practice Act, permit amendments setting up new causes of action, even though the statutory period had run at the time of the amendment. Nor is the defendant in any way harmed by this rule. The matter of amendment is left within the sound discretion of the Trial Court, and the Trial Court should, in all cases, permit an amendment which will present the issues which the parties had hoped and intended to try. Nor is this principle of amendment for the purpose of determining the real issues between the parties a new one. It was originally declared in *Hoboken v. Gear*, 27 N. J. Law p. 265, on p. 273, and commented on in *Miller v. West Jersey and Seashore Railroad Co.*, 76 N. J. Law p. 282, where the headnote reads as follows:

> Under Section 126 of the Practice Act (Pamph. L., 1903, p. 572), authorizing all such amendments as may be necessary for the purpose of determining in the existing action the real question in controversy between the parties, it is the question which the parties hoped and intended to try, not the question at issue upon the record, which determines the real question in controversy. *Hoboken v. Gear*, 3 Dutcher 273, followed.

In *Morgenweck v. Egg Harbor City,* 106 N. J. Law p. 141, the liberal tendency of the law on this question is demonstrated by the following from the opinion by the late Mr. Justice Kalisch speaking for this Court, on p. 142:

> "The first ground relied on and argued in the brief of counsel of appellant, for a reversal of the judgment, is, that the trial judge erred in refusing to dismiss the complaint, because the complaint failed to set forth that the alleged act or acts of negligence upon which the plaintiff relied for a recovery was or were committed by or through a servant or servants of the municipality, *and which omission was fatal to the validity of the complaint, and because the trial judge allowed the complaint which was invalid, to be amended, though it appeared the statute of limitation had run and the plaintiff's action therefore was barred.*
>
> "We find no merit in this contention. The amendment was properly made. *Wilson v. Dairymen's League Co-operative Association, Inc.,* 105 N. J. L. 188. The plaintiff's action was not barred, since it was commenced within two years from the time of the happening of the accident, *and the amendment which was allowed was not in legal effect, the substitution of a new cause of action for which no summons had been issued within the time required by law.*" (Italics ours.)

See also the opinion by the late Mr. Justice Katzenbach for this court in *Wilson v. Dairymen's, &c., Inc.,* 105 N. J. Law p. 188 (cited and quoted from in the *O'Shaughnessy* case), where it is held proper, although the statutory period of limitations has run, to permit an amendment in a death action substituting the

administrator *ad pros* as plaintiff in place of the general administrator (which seems much more like setting up a new cause of action than changing the date of the accident).

It will further be noticed that neither the *Wilson* case nor *Giardini v. McAdoo,* 93 N. J. Law p. 138 (in this court), another death case, mention or discuss Section 24 of the 1912 Practice Act, although the *Wilson* case does discuss Section 23 of the 1912 Practice Act and that the *Wilson* case relies upon the doctrine enunciated in *Hoboken v. Gear.*

It is also interesting to note that in the *Wilson* case, this Court overruled *Fitzhenry v. Consolidated Traction Company,* 63 N. J. Law p. 142, where it was held that an amendment setting up the proper person to institute suit under the death act will not be permitted after the statutory period.

It is submitted that the declaration of this Court in the *Morgenweck* case, *supra,* is clearly to the effect that even though the amendment sets up a new cause of action, nevertheless it relates back to the original institution of suit and is not *in legal effect* the substitution of a new cause of action, for which no summons has been issued within the time required by law.

(b)

The cases cited under this point, especially those dealing with liberal tendencies and permitting of amendments to present the issues which the parties hoped and intended to try also demonstrate that a change in the date does not set up a new cause of action. This liberal

tendency is further illustrated in the recent case of *Power B. & L. Ass'n v. Ajax Fire Insurance Company,* 112 N. J. Law p. 193, in this court; in this case, there had been a reversal on a prior appeal on the ground that the Trial Judge should have non-suited the plaintiff; the reversal, however, was remitted to the Trial Court without any specific direction; the argument was made that the retrial was barred by the limitation period, which argument was summed up as follows by this Court:

> "The additional ground for reversal, before referred to, is urged under Point 5 of appellant's brief and is: 'That the retrial of this action was barred by the period of limitations in the policy.'
>
> "Here it is urged that the judgment of this court upon the previous appeal amounted to a finding that at the first trial the plaintiff below should have been non-suited and that, therefore, the second trial, resulting in the judgment now under review, was erroneous, and was in fact the trial of a new action commenced more than twelve months next after the fire, in violation of an express provision to the contrary in the contract of insurance."

This Court held that a retrial was the proper procedure and (since, at the retrial, the plaintiff supplied the proof lacking at the first trial) affirmed the judgment for plaintiff, *despite the fact that the retrial took place after the period of limitation had expired, and this Court had held on the first appeal that plaintiff was entitled to a non-suit.*

In conclusion, it is respectfully submitted that the judgment should be reversed and a new trial granted for the reasons above argued.

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AARON MARDER,
Of Counsel.

POINT III.

The testimony taken at the trial is not needed for the determination of the legal questions involved in this appeal.

The respondents served their brief upon the appellant on Monday, October 15, 1934. Respondents' brief, under Point I (pp. 3-6), argues strenuously that the appeal should be dismissed because of appellant's failure to print the testimony taken at the trial. This, Appellant's Point III, is submitted, if this Court so permits, in answer thereto.

(a)

Rule 19 of this court (promulgated November Term, 1820, and last revised November Term, 1907), insofar as pertinent, reads as follows:

> "19. The appellant or plaintiff in error shall provide a state of case, which shall contain, in appeals, the pleadings, proofs and order or decree in chancery, with the petition of appeal and answer thereto, or, *in error, the record and bills of exceptions,* with the assignments of errors and joinder in error, the reasons given in the court below for the decree, order or judgment complained of, and any other documents proper to be considered in this court. * * *" (Italics ours.)

The word "record," as used, quite evidently means the strict record as defined by this Court in *Margolies v. Goldberg,* 101 N. J. L. p. 75, on p. 78, which strict record does not include the evidence. Any legal error in connection

with the evidence was brought up by the bill of exceptions.

Section 25 of the 1912 Practice Act (P. L. 1912, p. 382, amended by P. L. 1916, p. 109) abolishes bills of exception and writs of error and provides for an appeal which shall be in the nature of a rehearing upon any question of law involved in any ruling, order or judgment below.

Section 29 of the 1912 Practice Act (P. L. 1912, p. 383) reads as follows:

> "Sec. 29. Subject to rules to be made by the court of errors and appeals the practice in that court upon appeals from the supreme court or circuit court shall be the same as the practice upon appeals in the supreme court."

Supreme Court Rule 141 reads as follows:

> "The rules of court respecting the preparation and service of the statement of the case upon writs of error shall apply to appeals taken under the Practice Act, 1912. The statement of the case shall include the notice of appeal, the *record* of the case, *and so much of the evidence taken* and documents filed in the case *as shall be necessary to present the questions raised upon the appeal.*" (Italics ours.)

Again the word "record," as used in Supreme Court Rule 141, means strict record.

(b)

It is respectfully submitted that the testimony taken would not aid one iota in the determina-

tion of the legal questions involved in this appeal.

At the bottom of page 2 of this brief, appellant states and concedes that according to the proof, the accident happened on May 21, 1930. This is not in any way controverted or denied by the respondents in their brief.

Furthermore, the argument of respondents' counsel on the non-suit (pp. 16-22) clearly admits that, according to the proof, the accident occurred in May, 1930, to wit, the date set up in the amended complaint and this admission is binding upon the respondents. See *Mettie v. DeBaghian,* 103 N. J. L. p. 118, decided by this court. The following excerpts from the argument of respondents' counsel for non-suit are pertinent:

(p. 16, ll. 1-20):

> "Mr. Coult: At this time I move for non-suit on the ground that the present cause of action which we are litigating here is barred by the Statute of Limitations.
>
> "The Statute of Limitations has been pleaded in the amended answer. The history of this case is as follows: A suit was brought in February, 1932, in which it was alleged that an accident of the same type as this one had taken place in May, 1931. Subsequently an application was made to the Court to amend the complaint by setting up a cause of action based upon a similar accident, *which is this one alleged to have occurred in the year 1930.*" (Italics ours.)

(p. 17, ll. 25-42):

> "Time passes; the case is prepared,

> and they come to court ready and armed with proof to show that that accident did not happen. Now at that juncture the plaintiff says, We have made a mistake here, or been misadvised; *we want to shift the date of this back one year.* That puts it at a time, when that particular cause of action is first asserted, more than two years after the date that the cause accrued.
>
> "Now that raises an entirely different question, and one that the statute itself is primarily designed to protect one from; that is to say, it is not the cause of action of *1931,* the one that the defendant is ready to meet, the one to meet which he has interviewed witnesses and prepared his case, *but one of the year previous,* where he may never be able to get witnesses." (Italics ours.)

The argument on the non-suit also demonstrates beyond question that the sole question argued and the sole reason advanced for the non-suit was the statute of limitations; hence there is no room for the speculation appearing at the bottom of page 5 and top of page 6 of the respondents' brief as to what the learned Trial Court had in mind granting the non-suit; and it is submitted that it clearly appears that the Trial Court's reason for the granting of the non-suit was that he considered the amendment a new cause of action and barred by the statute of limitations and that the learned Trial Court adequately fulfilled his duty and stated his reasons for granting the non-suit as required by *Ippolito v. Borough of Ridgefield,* 94 N. J. L., page 97, decided by this Court.

The appellant is not asking this Court to determine whether or not the Trial Court was

justified in making a conclusion of fact; the appellant is conceding that the accident occurred more than two years prior to the date of the amendment.

(c)

In *Connolly v. Public Service Railway Co.*, 94 N. J. L., page 157, decided by this Court and cited in respondents' brief, the printed case did not exhibit any of the testimony taken at the trial and the errors alleged were predicated solely upon the Judge's charge. Nevertheless, this Court considered all of the alleged errors except one, without regard to the fact that the testimony was not printed; as to this one, the situation cited in respondents' brief, is altogether different from the situation in the case at bar; in the *Connolly* case there may have been no testimony that the trolley car was moving in excess of the statutory rate, in the case at bar it is clearly conceded that the accident occurred more than two years prior to the date of the amendment to the complaint and happened in May of 1930 as set out in the amended complaint.

In *Karnitsky v. Mashanic*, 94 N. J. L., page 127, decided by this Court and cited in respondents' brief, the third headnote reads as follows:

> 3. Where the statement of the case sent up to the appellate court does not contain the testimony taken at the trial, it will be assumed that the evidence commented upon by the court in the charge to the jury was all that was material upon the particular subject under discussion.

In this case also, the printed case did not contain the evidence. Nevertheless, two grounds for reversal dealing with requests to charge, were considered by this Court, free from all effect by reason of the non-printing of the testimony. The holding in connection with the third ground is set up in the headnote above quoted. It is again submitted that the *Karnitsky* case is altogether different from the case at bar in that in the *Karnitsky* case the record does not disclose whether there was other evidence for the Trial Court to comment upon; while in the case at bar the happening of the accident in May, 1930, more than two years before the date of the amendment, is conceded.

The other cases cited under Point I in respondents' brief clearly do not apply because they simply hold that on appeal from the District Court, conclusions of fact by the Trial Court are deemed to have been supported by the evidence where the evidence is not contained in the printed case on appeal.

(d)

It is further submitted that this non-suit was granted upon part of the strict record (which does not include the evidence), to wit, the amended pleadings, and hence, again, it is not necessary to include the evidence in the printed case.

(e)

Appellant is a poor man and the cost of procuring the testimony and printing same would,

it is submitted, be an undue and harsh burden upon him, especially in these times. Nevertheless, if this Court is of the opinion that the evidence is necessary for the determination of the legal questions involved in this appeal, appellant's counsel respectfully requests this Court for permission to procure the testimony so that the legal questions presented will be considered by this Court.

~~In conclusion, it is respectfully submitted that the judgment should be reversed and a new trial granted for the reasons above argued.~~

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New Jersey Court of Errors and Appeals

CHARLES RYGIEL, *Plaintiff-Appellant,* *vs.* SAM KANENGIESER and MORRIS KANENGIESER, *Defendants-Respondents.*	**Action at Law.** **On Appeal from Essex County Circuit Court.**

BRIEF OF DEFENDANTS-APPELLEES.

This cause was tried before the Honorable John C. Losey (Judge of the Sussex County Court of Common Pleas sitting by designation to hear Supreme and Circuit Court issues in Essex County), and a jury on January 23, 1934. At the conclusion of plaintiff's case defendants' motion for a non-suit on the ground that the cause of action proved at the trial was barred by the Statute of Limitations, was granted. From the judgment entered thereon plaintiff appeals.

Statement of Facts.

On February 10, 1932 plaintiff-appellant (hereinafter called plaintiff) instituted suit against defendants-appellees (hereinafter called defendants) in the Essex County Circuit Court (C 1). The complaint was based upon the alleged negli-

gence of defendants as owners of certain property in maintaining a certain common stairway as the result of which *on or about the 20th day of May, 1931* plaintiff fell and was injured (C 2-4).

Issue was joined on this allegation and on November 23, 1933 the matter was reached for trial (C 5). At that time plaintiff moved to amend the complaint to change the date of the accident from May 20, 1931 to *May 21, 1930.* The amendment was allowed over defendants' objection and exception and defendants were given leave to file an answer thereto (C 5). The allegations of the amended complaint were the same except for the change in date. Answering defendants set up by way of separate defense that the cause of action set forth in the amended complaint was barred by the Statute of Limitations (C 13).

Issue was again joined and the trial was held on January 23, 1934 before Judge Losey. At this time plaintiff produced seven witnesses, besides himself, who testified in his behalf (C 5). After all of this testimony had been introduced plaintiff rested and defendant moved for a non-suit on the ground "that the present cause of action which we are litigating here is barred by the Statute of Limitations" (C 16). After argument this motion was granted, the trial court saying:

> "I think in this case that it is a different cause of action and I will grant the motion for a non-suit" (C 22//22).

The State of Case presented to this court on appeal does not contain any of the testimony of the eight witnesses who appeared in plaintiff's case.

POINT ONE.

Appellant having failed to print the testimony taken at the trial, this court will assume that the evidence then received, supported the determination of the trial court that the amended complaint set forth a new cause of action which was subject to the bar of the statute of limitations.

It is a well known principle of appellate court practice that the record presented for review must contain everything which is or may be necessary to support or reverse the attacked ruling of the trial court. This is so because the actions of the trial courts are presumptively correct until the contrary is shown. Whenever an appellant neglects to print the testimony taken at a trial and urges that the court's ruling, which was or may have been based in whole or in part on the testimony, was erroneous, the appellate tribunal will assume that the testimony supported the ruling and refuse to reverse.

Goldberg vs. *Reed,* 97 L. 170;
McGeary vs. *Hyde,* 3 Misc. 115;
Kertesz vs. *Feldheim,* 6 Misc. 10;
Pyramid Petroleum Products Co. vs. *Abraham,* 6 Misc. 811;
Connelly vs. *P. S. Ry. Co.,* 94 L. 157;
Upton vs. *Slater,* 83 L. 373;
Max vs. *Kahn,* 91 L. 170;
Karnitsky vs. *Mashanic,* 94 L. 127.

In

Kertesz vs. *Feldheim,* 6 Misc. 10,

the trial court had held that the doctrine of *res adjudicata* controlled an element of the case. On

the appeal which attacked this determination it was said that:

> "The testimony was not printed in the record and we cannot say from aught that appears before us that the trial judge was in error. There appearing nothing to the contrary in the record, we must assume that the testimony supported the finding."

The Supreme Court in

Pyramid etc. Co. vs. *Abraham,* 6 Misc. 811,

held:

> "The evidence which is not before the court may have justified a finding of breach of contract. In the absence of the testimony, we must assume that the facts necessary to support the judgment were properly in evidence."

In

Goldberg vs. *Reed,* 97 L. 170,

it appeared that no statement of facts as found by the District Court was sent up with the record on appeal. The same court declared:

> "It must be assumed in considering the validity of the judgment that all the facts, tending to support it, and of which there was proof, were found by the trial court."

This court in discussing the same problem said through the late Chief Justice Gummere:

> " * * * But the instruction of the Court was that if the jury believed 'the plaintiff's testimony' etc.; and as very little of the testimony was returned with the record we cannot say that there was nothing in it to justify the court's statement * * * ."

Again by the same Chief Justice this court also said:

> " * * * The answer to this contention of appellant is, that it has not been made apparent to us that there was any other evidence than that which was referred to by the trial judge which threw any light upon the question of the negligence of the defendant so far as the driving of the bus was concerned. The appellant has not seen fit to submit the proof to us, and in the absence of anything to the contrary, we must assume that the evidence referred to by the trial court was all that had any materiality in determining that question."

In

Connolly vs. *Public Service Ry. Co.*, 94 L. 157,

the trial court erroneously charged the jury that there was no speed limit for trolley cars. The plaintiff appealed and failed to print any of the testimony in the State of Case. After pointing out that such error would only constitute the basis for reversal if it affected the substantial rights of appellant, the court said:

> "There is nothing in the case before us to show that the trolley car was moving in excess of the statutory rate, and if there were no such evidence, it is quite immaterial whether the judge erroneously instructed the jury with respect to the statute or not."

In the present case plaintiff has failed to print any of the testimony taken at the trial. That being so when the trial court said in passing on the issue raised by the amended complaint after the proof was in that "in this case it is a different cause of action", can this court say that he did not consider the evidence at all or that he may

not have considered it at all? Who can say to what extent, if any, his action was influenced by the assertions of plaintiff and his witnesses? With the record in this condition it is manifest that an appellate tribunal cannot determine (1) whether the trial judge looked to the proof in granting the non-suit or (2) if he did, whether he was legally justified in predicating his action in whole or in part upon it.

For this reason it is respectfully urged that the appeal should be dismissed.

POINT TWO.

The amendment of the complaint which moved the date of the alleged accident one year back from that specified originally and from a time within the statute of limitations to a time without it, constitutes a new cause of action which is subject to the statutory bar.

The original complaint alleged that the accident occurred on May 20, 1931. The suit was begun on February 10, 1932 about nine months thereafter. The amended complaint pushed the alleged date back one year to May 21, 1930. The application for the amendment was made and allowed November 23, 1933, three years and five months thereafter. This of course was after the Statute of Limitations had expired. It is urged that such a change cannot be made without destroying the beneficial effect of the limitation period.

Consider the defendants' situation prior to the motion to amend. They were served with suit papers containing an allegation that nine months previous plaintiff had been injured on their prop-

erty. Everyone realizes that where property which is leased or rented to tenants and containing common passageways which are in daily use, there is constantly present the possibility of accidents. The owner may know of some and not of others. This is so especially where he does not reside on the premises. So that when he is sued on the basis of an accident occurring on a certain date or even about a certain date he prepares his defense to meet an accident claim as of that date or one in reasonable proximity thereto. This is of course the method pursued by the defendants here. Then with their house in order they waited one year and eight months more before the case was reached for trial. During all of this period they had no inkling that they ever would be called on to meet any issue other than that created by the then pending suit. When they appeared in Court prepared to proceed an application was made to change the date to set forth similar accident on an entirely different day a full year previous to that alleged and three years and five months previous to the application. It would seem that under these circumstances unless the Statute of Limitations is to discard its value as a statute of repose, the amendment should be outlawed.

Assuming that the accident occurred, as stated in the amended complaint, on May 21, 1930, the time limitation for the institution of suit and for the prosecution of the cause of action expired May 21, 1932, more than a year prior to the application to amend. With the passing of that day this defendant acquired a vested right to be forever free from all claims or causes of action arising out of the accident, with the exception of that *one* which was specifically covered by the complaint already filed.

That this is the settled law is beyond question. *Bretthauer* vs. *Jacobson,* 75 Atl. 560, 79 L. 223, was an action brought under the Death Act. It appears that at the time the cause of action arose the period within which the suit had to be instituted was limited to one year. Fifty-three days thereafter the Legislature enacted an amendment increasing that time to two years. The suit was brought after the expiration of one year and prior to the end of the new two-year limitation. A demurrer to the complaint was sustained by the Supreme Court.

Chief Justice Gummere said *inter alia:*

> "But this provision of the Death Act is not an ordinary statute of limitation. It operates, not only as a limitation of the remedy given the plaintiffs, but also as a limitation of the liability which it creates against defendants. Consequently when the wrongful act which is the subject matter of the present litigation was committed by the defendants' employee, the defendants became legally liable for a period of twelve calendar months to compensate the next of kin of the deceased for the pecuniary injury resulting to them from his death, and were exempt from such liability at the expiration of that period. *Their right to complete exemption at the end of the time specified was as complete as the right of the plaintiff to hold them responsible in damages during the running of that time, and the right of each became vested when the wrongful act occurred.*"

In *Ryder* vs. *Wilson's Executors,* 41 Law 9, it was held that when a right of action has become barred under a statute of limitations, the statutory right is a vested right, that cannot be impaired by subsequent legislation.

In *Moore* vs. *State,* 43 L. 203, the Court of Errors and Appeals, speaking of the rule in civil cases, said:

> "But, since it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, it follows that where the remedy by action is tolled, the right also is legally extinguished, so far forth as that remedy was necessary for its enforcement."

It is undoubtedly true as was suggested by plaintiff at the trial argument that the trial Court has, under the Practice Act, a broad and liberal power to allow amendments to complaints. But it is also true that this power has never been and cannot properly be extended to the allowance of an amendment which will set up a new cause of action after the statute of limitations has run.

The recognition of such limitation on the power of amendment is not peculiar to New Jersey. It is accepted as the law in every jurisdiction whether the practice is regulated by the common law or by statutory enactment. In 37 C. J. 1074, Sec. 511, the rule is stated thus:

> "A statute providing for the amendment of pleadings does not permit a court, under color of ordering an amendment, to abrogate the statute of limitations. Hence the rule is that an amendment which introduces a new and different demand does not relate back to the beginning of the action, so as to stop the running of the statute of limitations, but is the equivalent of a fresh suit upon a new cause of action."

Also in 21 R. C. L. 580, Sec. 131:

> "It is however, an almost invariable rule that no new cause of action can be introduced in the case by amendment. * * *

"The general rule also prohibits the substitution or introduction of an entirely new cause of action, especially after the statute of limitations has become a law."

Again in 3 L. R. A. (N. S.) 267:

"It seems to be the settled rule that an amendment, in order to come within the doctrine of relation back to the commencement of the suit, must be a varying form or expression of the claim or cause of action sued on, and the subject matter wholly within the lis pendens of the original suit."

A pertinent case in this state on the question of a new cause of action is *Doran* vs. *Thomsen*, 79 L. 99, 74 A. 267. There Justice Trenchard said:

"The original declaration in this action contained three counts. This court, in an opinion reported in 74 L. 445, 66 Atl. 897, sustained a demurrer to the first and third counts, but allowed the second count to stand. The plaintiff then went to trial and obtained a judgment against the defendant, which, in an opinion in the Court of Errors and Appeals, reported in 71 A. 296, 76 L. 754, was reversed and a new trial awarded. The plaintiff now moves to amend his declaration.

"As it now stands the declaration charges, in substance; that the defendant was possessed of an automobile capable of being operated at a speed of 60 miles an hour, and it was the duty of the defendant to use due care of the same while being operated upon the highways; that defendant, disregarded that duty by negligently directing and allowing it to be operated by a member of his family, and while it was so negligently operated by a member of defendant's family, for the defendant, plaintiff was injured. It is now proposed to so amend the declaration that it will charge, in effect, that the defendant knowingly purchased a dangerous ma-

chine for the purpose of allowing it to be used by his daughter, an incompetent person, and negligently allowed her to use it, to the injury of the plaintiff.

"This, we think, sets up a new and different cause of action. Section 126, Practice Act April 14, 1903 (P. L. p. 572), authorizes all amendments necessary for the purpose of determining in the existing action the real question in controversy between the parties; but where the proposed amendment will institute an entirely new and different cause of action it will not be made. Lower *vs.* Segal, 60 N. J. L. 99, 36 Atl. 777; Fitzhenry *vs.* Consolidated Traction Company, 63 N. J. L. 142; 42 Atl. 416. We have pointed out that, as the declaration now stands, the negligence charged is made to depend upon the allegation that the automobile was carelessly operated by the defendant's servant, for the defendant. The gist of the action is the negligence of the servant imputed to the master. As it is proposed to amend the declaration, the negligence counted on is that of the father in supplying his inexperienced daughter with a dangerous machine, and its gist is the negligence of the father. Such an amendment would not tend towards the determination in this suit of the real controversy between the parties hereto, i. e. the issue which the parties hoped and intended to try (Hoboken *vs.* Gear, 27 N. J. L. 265; Miller *vs.* West Jersey & S. R. Co. (N. J. Sup.) 70 Atl. 175, 76 L. 282), but rather would operate to institute a new and different suit between the parties and presenting other questions."

The statute of limitations having expired in this case, the issue on plaintiff's motion to amend the complaint was clear and involved the determination of but one question: Does the proposed new count set up a new cause of action or is it merely a re-statement of the same one in varying form?

It is conceded that ordinary rules of pleading do not require that the exact date of an accident be stated in a complaint. For ordinary purposes the allegation that the cause of action arose on or about a certain date is considered sufficient and a slight variance is not regarded as fatal when within the Statute of Limitations. An exhaustive search of the decisions throughout the country has failed to disclose a tort case of this type when an amendment of the date has taken the cause of action beyond the statutory period. The only personal injury case cited in plaintiff's brief, *Levin* vs. *V. Clad & Sons Inc.,* 244 Pa. 192, 90 Atl. 570, indicates that a change of four days was made and that nearer in point of time to the date of trial.

The situation here is not analogous to a contract action wherein the date of the contract is amended after the statute has run (as in *Columbian Three Color Co.* vs. *Aetna Life Ins. Co.,* cited by plaintiff) and where there was only one contract in existence between the parties. In such a case both parties were aware of the contract sued on and the defendant was without ground for a plea of surprise or lack of or impossibility of defense preparation. The rule probably would have been otherwise had there been several such agreements between them.

Nor is the problem akin to changing the date of a distraint as in *Andrews* vs. *Marsdin,* 278 Pa. 56, 122 Atl. 171, (also cited by plaintiff) since both the court records and the facts are well known to both litigants and following the institution of suit it was impossible for either party to prepare for any other issue.

By attempting to distinguish these two Pennsylvania decisions, we do not intend to concede their legal propriety. On the contrary we feel that they are subversive of sound legal principles and that

they tend to destroy the utility of the Statute of Limitations.

Considering the relation of the defendants here as owners of the property in question to the plaintiff and to the public generally and having in mind the ever constant chance of one or many accidents on the premises and particularly the stairways, it is plain that to change the date of an accident is to change its gist. A person may fall once or more than once on the premises. The owner may know of one fall and not of another. The injured individual may elect to sue on a later fall and ignore the other either because he was not injured the first time or because the injuries were inconsequential. There can be no doubt that each fall presents a different cause of action. It is even possible that a person might have one fall on a certain date and then after ascertaining that there was no insurance coverage on the property, wilfully change the date to another year when there was such coverage.

In any event when an injured person waits until the Statute has run before asserting his real cause of action, the very reason for the existence of the statute should require the ruling that it is too late. The defendant having prepared to meet an entirely different accident may find it impossible to prepare his defense to the new allegation. Witnesses may have died, or gone beyond the seas, or disappeared and their whereabouts unknown or their memories of the accident may have dimmed or it is even possible that because of the lapse of time defendant may be unable to obtain either information about it or witnesses to it. These are possibilities which the statute is designed to guard against.

If the plaintiff here is allowed to amend his complaint and base his action on an accident which

allegedly happened more than three years prior to the application to amend what is to prevent the use of the same practice to move the date back five years or ten or twenty? The same principle is involved. The line must be drawn somewhere and if the Statute of Limitations is to be constant at all, it is urged that that point must be two years from the date of the accident. If therefore a plaintiff alleges that an accident occurred on a certain date or on or about a certain date, no restrospective amendment should be allowed after the limitation period has expired. To permit such amendments would be to open the door to all kinds of fraud and subterfuge which would have for their objective the circumvention of the statute. For instance if this practice is sanctioned, a person whose cause of action is barred by the statute might institute suit alleging a false date, but one within the statute, and then after the defendant has filed his answer without pleading it since it would not be applicable, move to amend to allege a date a year or two or five years earlier. What possible value would the statute then have?

The test laid down by all of the cases for determining whether or not a proposed amendment sets forth a new cause of action is that if the amendment sets forth substantially the same wrong with respect to the same transaction or if the gist of the action remains the same, no new cause of action is pleaded.

O'Shaughnessy vs. *Bayonne News Co.*, 109 L. 271;

DeLillo vs. *Manufacturer's Land & Imp. Co.*, 11 Misc. 164;

Casavalo vs. *D'Auria*, 12 Misc. 81 (off May term of this court—not yet reported).

Under ordinary circumstances the date of an accident would not seem to be its essence. However, in cases like the present, with the passing of months and years, time becomes of the essence and after the statute has run it is so bound up with the gist of the action that to allow it to be amended would be to confront the defendant with the almost insurmountable task of facing a new issue. Time in this type of action is the only identifying mark that it has. If it is lost or changed materially the whole action takes on a different aspect.

To allow amendments of this type would be to render nugatory the beneficial effect of the statute and to permit plaintiff under the guise of merely varying the form of the existing suit to avoid its proscription. The language of the late Chief Justice admirably expresses this thought:

> "Subject to such a system who could say when the Statute of Limitations had barred claims that had been imminent for years? Indeed by force of such a practice the statute that puts a time restraint upon actions would have no claim to be called a statute of repose" (Worthington *vs.* Maitland, 35 Atl. 760, 59 L. 114).

It is therefore urged that even assuming that the trial court did not consider the proof at all in granting the motion for non-suit, he was legally correct in holding that the amended complaint was barred.

POINT THREE.

Section Twenty-four of the Present Practice Act does not confer upon the courts the power to permit amendments which set forth new causes of action after the statute of limitations has expired.

Under the affirmative of this point plaintiff argues that the legislature intended, by the use of the phrase, "in addition to the present powers of amendment" in Section 24, to confer upon the trial courts the authority to permit the adding of a new cause of action to a complaint after the Statute of Limitations had been tolled. This argument in effect is an assertion that Section 24 of the Practice Act is an implied repealer of the Statute of Limitations in all cases where a suit in any form has been instituted within the period of limitation prescribed by the statute. When the suggestion is viewed in this light, its startling nature becomes clearly apparent. To adopt this view would be to say that a plaintiff who had instituted suit for false imprisonment, for instance, might, after a lapse of a number of years, amend the complaint and set forth a cause of action for assault and battery. Then, after the defendant had been allowed time to plead to the new cause of action, plaintiff might again amend at the trial and set forth a new cause of action, this time for malicious prosecution. The specious character of the contention of implied repeal of the Statute of Limitations is manifest. As Chief Justice Gummere said in *Worthington* vs. *Maitland, supra,* under such a system the Statute of Limitations would have no claim to be called a statute of repose.

Examination of all of the cases involved in the problem of amendments to complaints will demonstrate that the appellate courts of this state have never in any wise indicated that Section 24 of the Practice Act destroyed the bar of the Statute of Limitations. On the contrary, every opinion definitely proclaims as the established doctrine that no new cause of action can be inserted in the complaint by way of amendment after the Statute of Limitations has run.

It is well known that repeal by implication is not favored in the law. It is only when an examination of the two statutes reveals that the later one was clearly intended to abrogate the earlier, or when the provisions of the later one are so irreconcilable or so inconsistent with those of the earlier that no other conclusion can be reached, that the first statute is declared impliedly repealed. An effort is always made to reconcile the two statutes and to treat them as in *pari materia* whenever such treatment is at all possible. The only reasonable view in the present case is that Section 24 of the Practice Act and the Statute of Limitations are in no wise in conflict, that Section 24 is merely an amplification of Section 23 and was intended by the legislature to remove any doubt that the trial courts might have on the question of their right to permit amendments, prior to the expiration of the statute, which set forth new causes of action.

It is therefore respectfully submitted that the judgment of non-suit should be affirmed.

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