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New Jersey Court of Errors and Appeals

MICHAEL J. COONEY, *Prosecutor-Respondent,* *and* SAMUEL W. RUSHMORE, trading, etc., *et als.,* *Defendants-Appellants.*	*On Appeal from the Supreme Court.*

Brief for the Respondent.

The respondent was severely injured on March 9, 1914, while in the employ of the defendant. His left arm was caught in a circular saw and was so badly cut and lacerated that he has entirely lost the use of his left hand, and his left arm is, to some extent, paralyzed. He continued his work with the appellant until December, 1914, at the same time undergoing medical treatment, when his hand became stiffened and he was obliged to stop. He made no effort to recover compensation until he had definitely ascertained the extent of his injury.

On the 8th day of March, 1915, he caused a petition, praying for compensation for injuries under the Workmen's Compensation Act, to be presented to the Common Pleas Judge of Union County. The petition did not bear the filing stamp of the Union County Clerk, but the Judge on that day signed an order fixing a day for hearing and for service upon the appellant and the papers were served on the defendant on March 8th. They were not lodged with the County Clerk until March 10th. We quote this order hereafter. The appellant filed an answer, setting up as his only defense, that the respon-

dent was not entitled to compensation because the petition had not been filed within one year from the date of the accident, pursuant to the amendment of 1913 to the Workmen's Compensation Act. All the facts alleged in the petition were admitted. Upon the day fixed for hearing the Court of Common Pleas sustained the contention of the appellant, as set forth in his answer, and dismissed the petition for that reason alone.

The present counsel in the case were retained for the purpose of appealing from the judgment of the Common Pleas Court, not having represented the respondent in the proceedings held in that court. A writ of certiorari was granted by Mr. Justice Bergen and the matter was argued before him sitting alone, as provided by statute, and he filed his opinion (Case, p. 28) reversing the judgment of the Common Pleas Court. An appeal was made to this Court.

The petition was filed within one year from the date of the accident pursuant to the statute.

When the petition was presented to the Common Pleas Judge on March 8th, 1915, he signed an order in the following language:

> "*A petition having been filed in this cause by Michael J. Cooney, petitioner, praying for the compensation payable by* Samuel W. Rushmore, the respondent, it is on this eighth day of March, 1915, on motion of John P. Owens, attorney for petitioner, ORDERED, that the hearing of said matter be and hereby is set down for Friday, the third day of April, 1915, at the Court House, in the City of Elizabeth, at ten o'clock in the

forenoon, or as soon thereafter as counsel can be heard. And it is further

"ORDERED, that a true, but uncertified copy of this order, together with a copy of the petition, upon which this order is issued, be served upon the respondent, within six days after the date of this order." (Italics ours.)

The petition and order were then delivered to the Sheriff and returned served upon the appellant upon March 8, the return reading as follows:

"Received Union County Sheriff's Office. March 8, 2:12 P. M., 1915. Elizabeth, N. J. George C. Otto, Sheriff. I hereby deputize and appoint Alexander D. Ayers, a special deputy to serve the within writ. Witness my hand and seal this 8th day of March, A. M., 1915. Sheriff of Union County. Service of the within petition and order upon Samuel W. Rushmore by leaving a true copy thereof at his usual place, No. 604 Belvidere Avenue, Plainfield, N. J., with a member of his family above the age of fourteen, March 8th, 1915. George C. Otto, Sheriff, by Alexander Ayers, Special Deputy. Sheriff, $3.28."

The original petition and order were returned by the Sheriff to the County Clerk's Office on the 10th of March, 1915, and the stamp of the Clerk's Office appears on the back of the order in the following language:

"Union County Clerk's Office. Filed, March 10, 1915. James C. Calvert, Clerk."

Because the original petition was not physically lodged with the County Clerk within one year from the date of the accident the appellant

insists that no action could be maintained, because of the amendment to the Workmen's Compensation Act of 1913, Section 23, which is quoted on page one of appellant's brief.

We contend, and are supported by the opinion of Mr. Justice Bergen in our contention, that the signing by the Common Pleas Judge of the order above quoted in the language in which it is expressed, is a certification by the Judge that the presentation of the petition to him is a filing of that paper within the meaning of the statute.

It is the Court of Common Pleas which is given jurisdiction over Workmen's Compensation cases and not the Judge of that court as a distinct tribunal (opinion Justice Bergen, p. 31, l. 10). Paragraph eighteen of the Act provides that in case of a dispute over a claim for compensation, either party may submit the claim to the Judge of the Court of Common Pleas, who is authorized to hear and determine the matter in dispute in a summary manner. Section twenty, as amended by Chapter 174 of the Laws of 1913, provides that the petition may be presented to the Judge of the Court of Common Pleas and shall be filed with the Clerk of the Court of Common Pleas. The determination of the Judge is filed in that court and judgment is entered therein. The language of Section twenty-one is:

> "The compensation herein provided may be commuted by said Court of Common Pleas."

so that it is with the Court of Common Pleas that the original petition, the order fixing the day for hearing, and all other papers in the case, are filed. The Clerk of the Court is a mere officer and custodian of the record of the case. The papers in a case are not filed with the Clerk nor with the Judge, but with the court,

and any officer can receive the petition or any other paper and consider it filed with the court when presented to him.

The procedure prescribed by the statute is outlined in paragraph twenty (P. L. 1913, page 307) as follows:

> "Either party may present a petition to said Judge, setting forth the names and residences of the parties and the facts relating to employment, etc." * * *
>
> "Upon presentation of such petition the same shall be filed with the Clerk of the Court of Common Pleas and the Judge shall by order fix a time and place for the hearing thereof, not less than three weeks after the date of the filing of said petition. A copy of said petition and order shall be served as summons in a civil action and may be served within six days thereafter upon the adverse party."

The language is not as definite as it might be but it seems to indicate that the petition must first be presented to the Judge, and the order signed after the petition has been filed in the Common Pleas Court. It is only after the filing of the petition in the court that the Judge has authority to sign an order fixing a day for hearing. It, therefore, follows if a petition is presented to the Judge together with an order, and the petition has not actually been delivered to the Clerk and marked filed by him, that the signing of an order, under these circumstances, indicates that the Judge considers the presentation of the petition a sufficient filing with the Court of Common Pleas, and he is, therefore, authorized to sign the order fixing the day for hearing. He might write upon the back of the petition and order the word "filed," together

with the date and his initials, and the petition and order would then, undoubtedly, be considered on file in the Common Pleas Court, although neither paper had been physically lodged with the County Clerk.

This practice is repeatedly followed in the Court of Chancery when a bill of complaint or petition is presented to a Vice-Chancellor and an application for an order to show cause is made. The Vice-Chancellor will sign the order and write the word "filed" and the date on the back of the bill and the order and the papers are then considered to be on file in the Court of Chancery, although they are not actually received by the Clerk in Chancery until the following day. The same practice is followed when an application is made to a Supreme Court Justice for a writ of certiorari. After the writ is allowed he will write the word "filed" on the back and also upon the back of the affidavits presented, and these papers are considered on file in the Supreme Court on the date of presentation, although they are not actually delivered to the Clerk until the following day.

It is not even necessary for a Judge to mark papers filed when they are presented to him in order to constitute a filing. If he indicates in any way that he considers the presenting of the papers a filing in the court over which he presides, it is sufficient.

This, we think, was clearly done by the Common Pleas Judge in the present case. The petition and order were presented to him. They bore no stamp of the County Clerk. Under the statute the Judge had no authority to sign the order unless the petition was on file in the Common Pleas Court. He indicated that he considered the presentation to him of the petition a

filing in the court by the language of the order which he signed "the petition having been filed in this case." This sentence was his authority for the signing of the order and was at the same time a certification by him that the petition was on that day, March 8, 1914, on file in the Common Pleas Court of Union County. He had just as much authority to either mark a paper filed, or indicate the fact that he considered it filed when presented to him, as a Vice-Chancellor or Supreme Court Justice. He is an officer of the Common Pleas Court and the reception by him of a paper, which is a record of that court, is just as much a filing, within the meaning of the statute, as if it had been lodged with the County Clerk.

This is the view expressed by Mr. Justice Bergen in his opinion. He says, page 31, line 38:

> "The certificate of the Judge that the petition was filed, is in my judgment just as effective as if he, as the Judge of the Court of Common Pleas, had endorsed the date of filing on the petition. * * * The statute must be given a reasonable construction, and when a petition is presented to the Judge of the court and he not only certifies that it has been filed, but acts upon it as he only could after it was filed, the petition becomes a record of the court from that date, and is to be taken as filed with the Clerk of the Court at the time when the Court certifies that it was filed."

In considering this case and the meaning to be given the limiting statute, it must be borne in mind that the defendant was served with process, had notice that the respondent was seeking to recover compensation from him under the

Workmen's Compensation Act, and had notice that the petition had been filed all within a year from the date of the accident. Everything which was necessary to be done by the respondent, with the single exception of the lodging of the paper with the Clerk of the Court, its custodian, was done within the year's time.

The appellant contends that the statute requires the lodging of the papers with the County Clerk within a year's time, and that unless the petition and order, which are served upon the defendant, bear the filing stamp of the Clerk, the defendant is not properly brought into court.

This argument assumes that the only way a paper may be filed in the Court of Common Pleas is by placing it in the custody of the Clerk of the Court. It entirely overlooks the fact that a paper presented to a Judge and marked filed by him, or certified by him to be filed, is just as much on file with the Common Pleas Court as if it had been delivered to the Clerk and stamped with his file. The Judge had just as much power to receive a paper for filing as the Clerk.

If a bill of complaint is marked filed by a Vice-Chancellor before it has been received by the Clerk in Chancery and a true copy is served and the original is shown to the defendant, the defendant is properly served and he is just as much in court as if the solicitor had waited to make service until after the bill had been received by the clerk in Trenton. A summons and complaint are served by the Sheriff in actions at law in the Supreme Court before they are filed with the Clerk and the defendant is properly served.

So, if the presenting of the petition to the Judge in this case amounts to a filing in the

Court of Common Pleas, as we contend, there can be no question but that the defendant was properly served within a year from date of the accident.

Reliance is placed by the appellant upon the case of *Hendrickson* v. *Public Service Railway Company,* 87 N. J. Law 366. The facts in that case were entirely different from the case at bar. There the petitioner was injured on the 9th day of May, 1913, and the petition was presented on the 8th of May, 1914, and the paper was lodged with the clerk on the 13th of May, 1914. The order signed by the Judge on the presentation of the petition contained this clause:

> "Upon presentation to me on this 8th day of May, 1914, of the petition in the above stated case by Harry D. Wells, attorney of petitioner,
>
> "IT IS THEREUPON ORDERED that the same be filed with the Clerk of this Court."

It was argued in the Supreme Court that the presenting of the petition to the Judge was equivalent to a filing. The Supreme Court said:

> "It is enough to say that the Judge and the attorney for the plaintiff did not so treat it. The Judge made an order that it be filed with the Clerk of the Court, and the attorney complied with the order five days later."

This case is distinguished by Mr. Justice Bergen in his opinion (Case, page 31), in the following language:

> "The case of Hendrickson *v.* Pub. Ser. Ry. Co., 87 L. 366, is not applicable to the present situation, for in that case the Court made an order that the petition be filed with the Clerk of the Court of Common Pleas and this was not done within one year, nor does it appear that any order was made

declaring that the petition was filed and fixing a time for hearing. The decision in that case was put upon the ground that neither the Judge or the petitioner considered the presentation of the petition as a filing, in fact the contrary appeared for the Court made on order that it be filed."

In the present case both the Judge and the attorney treated the presenting of the petition as a filing, for the practice of the Court of Common Pleas of Union County which had been followed in a hundred previous cases under the Workmen's Compensation Act was followed here. Testimony was taken under the writ and the evidence of Mr. Norman (Case, page 26) shows that out of one hundred and five cases, which had been previously brought in the Union Common Pleas under the Workmen's Compensation Act, the practice of presenting the petition and order to the Judge, and then to the Sheriff, and after service had been made filing with the County Clerk, had been followed in all but five or six. (See also testimony of Mr. Runyon, page 24, l. 37.) So that the attorney who then represented the petitioner was following the regular practice which had been adopted in the Common Pleas Court.

The defendant criticises Justice Bergen's opinion by saying that the certification of the trial Judge that the petition was filed, has no basis in fact. Appellant again assumes that a filing cannot take place in a Common Pleas Court except when a paper is lodged with the Clerk. The certification was correct and was based on facts according to the Judge's view, for he considered the presenting of the petition a filing and certified to that effect. The recital was placed at the head of the order to show the Judge's au-

thority for signing it, for unless the petition was filed, he had no authority to sign it.

The fact that the Judge dismissed the petition, after the point raised in defendant's answer had been brought to his attention, is not proof that he did not consider the presenting of the petition a filing. He probably thought when the petition was presented to him, together with the order, that it was a sufficient filing, and upon hearing the defendant's argument, and reading the brief decided that he had been wrong, and that there must be a strict filing with the County Clerk in order to comply with the statute. His decision merely shows a different interpretation after consideration of the case.

We cannot see that the case of *Ringwalt Linoleum Works* v. *Liquor,* 99 Atlantic Reporter 124, has any bearing upon the present case. The petitioner failed to prosecute his action with sufficient regularity and dispatch and the Court held that in this he violated the spirit of the Act.

This cannot be charged to the respondent. He had until the very last day to bring his action and he performed every necessary act upon that day with the exception of lodging the paper with the person who was to keep it as a permanent record.

The definition of the word "file" and the meaning given to it by courts indicates that the presentation of a paper to a Judge amounts to a filing in a court over which he has jurisdiction.

A word with reference to the meaning of the word "file." It is defined by Webster as follows:

> "To bring before a Court or legislative body by presenting proper papers in a regular way; as to file a petition or bill."

The Standard Dictionary defines the verb "file" as follows:

> "To present in the regular way, as to a judicial or legislative body, so that it shall go upon the records or into the order of business; as to file a bill."

Abbott's Law Dictionary says:

> "Filing a paper is considered an exhibition of it to the Court, and the Clerk's Office in which it is filed represents the Court for that purpose."

We respectfully urge that the views expressed by Justice Bergen in his opinion are correct, *i. e.*, that the petition in this case was presented to the Judge, and he certified that it had been filed, and made an order which he could only make after such filing, therefore, it must be taken to have been filed upon the date certified by the Court, March 8, 1914, within a year after the accident.

The Appellant did not properly raise in the Court of Common Pleas the issue on which he relies.

Since the appellant is insisting upon a strained technical interpretation of the statute in his favor, we would suggest that the practice followed by him in the Court of Common Pleas was not the proper practice.

Section 20 of the Compensation Act sets forth the procedure in case of dispute. It provides that either party may present a petition setting forth "the names and residences of the parties and the facts relating to employment at the time of injury, the injury in its extent and character, the amount of wages received at the time of injury, the knowledge of the employer or notice

of the occurrence of said injury, and such other facts as may be necessary and proper for the information of the said Judge, and shall state the matter or matters in dispute and the contention of the petitioner with reference thereto." It then provides for service of a copy on the adverse party who, within seven days after service, "shall file an answer to said petition, unless the Court for good cause shall grant further time, which shall admit or deny the substantial averments of the petition and shall state the contention of the defendant with reference to the matters in dispute *as disclosed by the petition.*" (Italics ours.)

In other words, the answer, if one be filed, must meet the substantial averments of the petition by admission or denial and must state the contention of the defendant only in regard to the matters in dispute which the *petition* discloses. The point here attempted to be raised by answer was not one disclosed on the face of the petition but was one upon which the record of the office of the Clerk of the Court of Common Pleas was necessary. The proper practice, therefore, was not to file an answer at all, but to appear specially as in the case of improper service of process and challenge the jurisdiction of the Court to make an order for hearing on the ground that the petition was not lodged with the Clerk as required by the statute within a year. There is no provision in the statute for raising legal technical points by answer, and if there were, the familiar rule of law which requires special appearance on jurisdictional questions would not be waived unless the statute expressly so provided. We contend, therefore, that the practice pursued by the appellant in filing an answer in the court below which involved a general appearance waived his right to defend upon

jurisdictional or purely legal grounds. Having appeared he may answer only "with reference to the matters in dispute as disclosed by the petition."

The Limiting Act, paragraph twenty-three of Chapter 174 of the Laws of 1913, should be liberally construed in favor of the Respondent.

It is a well settled principle of statutory construction that courts frequently depart from the literal meaning of the words of a statute and will give them a meaning which may be contrary to the letter of the statute, but which, nevertheless, carries out the intention and purpose of the act.

We contend that the Court in construing paragraph 23 should construe the limiting act in accordance with the general spirit of the Compensation Act and should accept such definition of the word "file" as will effectuate the purposes of the statute—certainly wherever this can be done without thereby changing the rights and duties of the parties in any substantial manner.

The general object of all statutes of limitation is to require a person to begin an action within the period prescribed. The action must be begun by the party seeking relief. The Compensation Act is a great remedial statute. It is charitable to some extent and its object is to benefit workmen in every way possible, upon the theory that the expense of all injuries to employes, regardless of negligence or contributory negligence, should be borne by the employer as a part of the expense of the business. The workman cannot afford to sustain the loss, and it is better for the community in general that the employer should bear the burden.

Bearing in mind the purpose and object of the Act, it cannot be that the legislature intended by the limiting statute to deprive a man of his right to compensation, because he has failed to place a paper with one officer of the court, which has jurisdiction over his case, when he has presented that paper to the Judge who determines the amount which is due him, has obtained an order fixing the day for the hearing of his case, and has brought the defendant, his employer, into court within the time limited. In other words, the legislature never intended, when the limiting act was passed, that it should be construed so strictly as to require the actual lodging of the petition with the Common Pleas Clerk in order to constitute a filing in the Common Pleas Court when every other necessary step in the proceeding had been taken, as was done in the present case. We respectfully submit that all that should be required under this Act is the presenting of the petition and order, and service of the papers within the year; that the word "filing" should be considered to mean a filing of papers with the Court of Common Pleas as a record of that court, and that such filing may be legally performed by placing the papers in the hands of any officer of the court, whether it be the Judge or Clerk, who signifies that he considers such presentation a filing; and that "filing" should not be held to mean that the paper must be handed to the Clerk of the Court, and that no other method is a sufficient filing with the Court.

The employer would be deprived of no rights by such a construction, for the Judge must fix a day for hearing within three weeks and service must be made within six days from the signing of the order. If the petition and order are not on file upon the date for hearing the Judge

would order them to be filed and proceed with the case or dismiss the proceedings if the original petition was not produced. The employer stands exactly in the same position in the present case as if the petition had been lodged with the County Clerk on March 8th.

This same word has been interpreted by the Supreme Court of this State in *Turnpike Co.* v. *News Co.,* 43 N. J. Law, 384. In that case section four of the Act relating to telegraph companies limited the price which might be charged for messages. Section twelve prohibited the disclosure of the contents of any message and enacted "that all dispatches which may be filed at any office in this State for transmission to any point shall be so transmitted without being made public." In construing the meaning of the latter section, the Court said:

> "The word 'filed' might be construed to mean only such messages as the company chose to accept and file for transmission. In its strict sense, it would not include even messages received and sent at once before filing; but it would be a narrow interpretation of the clause and render its evasion so easy that it would be almost nugatory."
>
> "It is *more reasonable* to hold that it signifies all *messages which may be left* for transmission; imposing a duty commensurate with the privileges granted." (Italics ours.)

Other cases which illustrate this principle of statutory construction for which we contend are *Morris Canal and Banking Co.* v. *Central Railroad of New Jersey,* 16 N. J. Eq., 419; *Wallace* v. *Wallace,* 3 N. J. Eq., 616; *The State* v. *Clark,* 29 N. J. Law, 96; *Howard* v. *Blackford,* 3 N. J. Law, 568-778; *United States* v. *Fisher,* 2 Cranch,

386; *Brown* v. *Wright,* 13 N. J. Law, 240; *Thompson* v. *Egbert,* 17 N. J. Law, 459; *Hoguet* v. *Wallace,* 28 N. J. Law, 523; *The State* v. *The Mayor of the City of Paterson,* 35 N. J. Law, 196.

For the reasons given we respectfully submit that the judgment of the Supreme Court should be affirmed.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

MICHAEL J. COONEY, *Petitioner-Respondent,* *vs.* SAMUEL W. RUSHMORE, formerly trading as RUSHMORE DYNAMO WORKS, *et als.,* *Respondent-Appellant.*	*On Petition for Compensation.*

See page 11 for Statement of Facts.

Brief.

The petitioner in the above matter was injured on the ninth day of March, nineteen hundred and fourteen, while in the employ of the above respondent. The question now arising is whether the Petition and Order in the above matter was filed in the County Clerk's Office of Union County within the time prescribed by law. Paragraph 23 of the Workmen's Compensation Act, as amended in 1913, states as follows:

> "In case of personal injuries or death all claims for compensation on account thereof shall be forever barred unless within one year after the accident the parties shall have agreed upon the compensation payable under this Act, or unless within one year after the accident one of the parties shall have filed a petition for adjudication of compensation as provided herein."

The word "herein" applies to Paragraph 20 of the statute referring to a case of dispute between the parties, which provides the method by which either party may institute the action

under the Workmen's Compensation Act. Paragraph 20 reads as follows:

> "Upon the presentation of such petition the same shall be filed with the Clerk of the Court of Common Pleas, and the judge shall by order fix a time and place for the hearing thereof, not less than three weeks after the date of the filing of said petition. A copy of said petition and order shall be served as summons in a civil action and may be served within six days thereafter upon the adverse party."

The cases relied upon by the petitioner refer to actions at law, and as to what construction shall be placed upon the words "commenced" and "sued" it readily appears that the latter words are susceptible of interpretation and do not refer to a single act. In disposing of the interpretation of the words "commenced" and "sued" we admit that the courts of New Jersey have held that an attorney who has prepared a summons and complaint in an action before the statute of limitations applying to such action, has run, has commenced and sued such action within the time prescribed by law. It is to be noted that *filing with the clerk of the Common Pleas Court* is a definite requirement, and that the presentation of the petition to the Court is a totally different thing. The Compensation Act is entirely a creature of statute and is certainly in derogation of the common law, and therefore, must be construed accordingly. The Court, the attorneys, and the Clerk of the Court of Common Pleas have no power in an action under this Act other than what the words of the Act actually allow them. There is no way that the Court can call the petition filed, when it is not filed, because the statutory requirement of filing with

the Clerk of the Court of Common Pleas would not thereby be complied with. Under the statute three weeks are to follow from the date of filing an order to the date of the hearing on a petition, and that being so, and the words being plain that the Court is to set a day, not less than three weeks after the filing of the petition in the County Clerk's office, certainly, if the petition isn't filed in the Common Pleas Clerk's office, then the statute has not been followed and the defendant is not properly in court. (*Hendrickson* v. *Pub. Ser. Rwy. Co.*, 87 N. J. L., page 366.)

The petition and order in this case were filed on the 10th day of March, 1915, which was not within the time prescribed by the Compensation Act. The statute of limitations, in speaking about the filing of the petition, must necessarily relate to filing with the clerk of the Court of Common Pleas, as mentioned in Paragraph 20. The Common Pleas Judge has power to make the order setting a date for hearing and of determining the rights of the parties as between each other, but the Act does not give him any power to file a pleading under this Act, and the presentation to the judge is not filing, as is prescribed by the Act. The purpose of having a distinct provision for the filing of a petition in a certain fixed and determined place, clearly is to establish beyond doubt whether or not there is any action of the type in question pending against an individual or corporation. At the end of three hundred and sixty-five days from the happening of an accident, either a suit exists of record in the Clerk's office, or none can be brought for that accident. The word "filed" is explained in Cyc. Vol. 19, page 529, as follows:

> "Delivered to the proper officer and by him received to be kept on file. The deriva-

tion and meaning of the word, as defined in the dictionaries, carries with it the idea of permanent preservation; becoming part of the permanent record of the public office where it is filed, and includes the idea that the paper is to remain in its order on the file in the office." Also,

"A bill in chancery is said to be filed when it is delivered to the Clerk, and he states the day when it was brought into his office, numbers it, and receives it into his custody." Phillips *v.* Beene, 38 Ala. 248-251 (citing 1 Daniell, Ch. Pl. & Pr. 454). See also case of Mutual L. Ins. Co. *v.* Phinney, 76 Fed. 617-621.

A very important case on the question of filing is that of *In Re Norton,* 53 N. Y. Supp. 924; the opinion being by the late Mayor Gaynor. Among other things, the opinion reads as follows:

"But the difficulty in the way of this interpretation is the word "file." In order to be "filed" with the Clerk a paper must be delivered to him in his office, where the law requires him to keep his books and files, and to receive and file papers."

In *Schenck* v. *Yard,* 86 Atl. Rep., page 81, Chancellor Walker, in speaking of the custom of considering pleadings, filed on the day before they are in fact received in the mail, says:

"As well might a party having a deed or mortgage for certain premises mail the same to the appropriate county clerk or register and claim that he was entitled to priority over a deed or mortgage actually delivered to the clerk prior to the reception by him of the other instrument through the mail, if his deed or mortgage were actually deposited in the post office or a letter box

first. If the time of depositing a pleading or other document in the mail is to constructively operate as its filing or recording in the proper official depository, then as well would such paper be entitled to be docketed any number of days before its actual reception by the proper officer as one day, provided the mailing took place a certain number of days instead of one day before it reached its destination. And what of documents lost in the mail? Would office copies or substituted originals be filed or recorded upon affidavit showing such loss, in cases where it becomes important to the party interested to have the record made up as of a given day? I think not. The only way to file a bill is to file it, and any person who intrusts one to the mail or a messenger does so at his peril."

It is submitted that the Chancellor's remarks, just quoted, have proper application to the case of a document presented to a court, especially where the court does not retain control of the paper, and has no intention of retaining control of it. See also case of *Young* v. *Young,* 5 Stew. Eq., page 275 (bottom of page 276).

It might be well worth examining a few definitions with reference to the word "file" from "Words and Phrases Judically Defined," which are as follows:

"The paper whose filing carries notice or affects private rights is filed only when deposited with the proper officer at his office for this special purpose. * * * It means a presentation to him at the proper place, and within the proper time. In Tregambo *v.* Comanche Mill & Mining Co., 57 Cal. 501, it is said "Filing a paper consists in leaving

it at the proper office and leaving it to deposit with the papers in such office. Hence, where an attorney, after office hours, hunts up a deputy clerk, and gives him papers for filing, but the clerk does not place them on file until the next day, the delivery to the clerk did not constitute a filing.

Hoyt v. *Stark,* 66 Pac. 223, 224, 134 Cal. 178.

"Filing imports that the paper filed shall remain with the clerk as a record subject to inspection by those who have an interest in it, and to be certified by the clerk as any other paper properly lodged in the office and committed to his custody." Meridian National Bank *v.* Hoyt & Bros., 21 South. 1213, 74 Miss. 221; 37 L. R. A. 796."

Bouvier, in his Law Dictionary, defines "file" as follows:

"A thread, string or wire upon which writs and other exhibits in courts and offices were fastened or filed for the more safe keeping and turning to the same. Filing a paper, in modern usage, consists in placing it in the custody of the proper official by the party charged with the duty of making of the proper endorsement by the officer. 2 S. Dak., 525. In the sense of a statute requiring the filing of a paper or document it is filed when delivered to and received by the proper officer to be kept on file. The word carries with it the idea of permanent preservation of the thing so delivered and received; that it may become a part of the public record. It is not synonymous with deposit. 67 Hun., 560."

From the foregoing cases it would appear that the proper way to file a paper with the clerk of the Court of Common Pleas, as required by our

statute, would be to file it with that individual. Some cases hold that it should be deposited with that individual at his office and during office hours, and some hold that the mere giving it to the clerk is sufficient, but this distinction does not concern us at this time. The petitioner was injured on March 9th, 1914, and his petition and order were not filed until March 10th, 1915, and we therefore submit that the filing was not within time.

We further submit that the question when the respondent was served by a copy of the petition is immaterial. The same effect is to be given such service, as if it were an ordinary summons, not properly served. The statutory remedy given by the Compensation Act must be followed strictly, and the procedure by which the remedy is obtained must be followed strictly by the petitioner. The respondent has little enough opportunity to defend the action, and therefore, the Legislature has placed certain limits to the respondent's liability. The one year provision with reference to the filing of the petition, was incorporated in the Act in 1913 for a purpose, and we submit that such purpose should not be defeated by straining of the words of an Act, the interpretation of which words is plain.

The filing of a petition is the initial proceeding under the Workmen's Compensaton Act. The testimony taken before Jesse R. Salmon, a Supreme Court examiner, on December 20th, 1916, in no way militates against the argument hereinbefore presented. Turning first to the testimony of Charles W. Runyon (page 21, l. 26; page 25, l. 36), who testified that he was engaged in the Common Pleas Court and also has charge of the filing of cases, he testified to a general procedure as to the filing of petitions and or-

ders in workmen's compensation cases. Our objection to this is that irrespective of the procedure in the Union County Clerk's office, the Compensation Act must be followed strictly, and the Union County Clerk may not alter or amend or supplement the rule in reference to the time within which petitions and orders must be filed. We, therefore, objected to the testimony in reference to the procedure in the above mentioned office, on the ground that it was immaterial, incompetent and irrelevant. It further appeared, from his testimony, however, that the clerk did not receive the petition and order except in about six of 105 cases until after the attorney for the petitioner had delivered an original and a copy to the sheriff, who served a copy and made his return on the original, which original was then filed in the County Clerk's Office. So that, if this is the case, no one would be to blame for the failure to file a petition within time, except the attorney who did not follow the proper procedure and who took a chance of delivering an original and copy of the petition and order to the sheriff for service first, before the original was filed in the County Clerk's Office. Going into the question of custom, the testimony further showed that the judge of the Common Pleas Court never delivered the original petition and order to the clerk himself for filing, the sheriff having delivered the same to the County Clerk in every case. To the same effect was the testimony of Zerman K. Norman, who also was connected with the Union County Clerk's Office. (P. 26, l. 8; p. 27, l. 15.)

It certainly cannot be held that the employer is responsible for the act of an attorney for an injured man who does not follow the requirements of the statute which creates the remedy

and the method of enforcing it. The Hendrickson case quoted above seems to have disposed of this point also, when it says that the statute has not been followed, and therefore compensation is denied.

We desire to briefly comment on the opinion filed in this case in the Supreme Court, reversing the Union County Pleas, which appears on pages 28, 29, 30, 31, 32 and 33. The effect of the entire opinion is summed up in the following concluding lines of the opinion: "My opinion is that, when the petition is presented to the Judge of the Court of Common Pleas and he certifies that it has been filed and thereupon makes an order which he can only make after such filing, the petition must be taken to have been filed on the date certified by the Court, and that in this case the petition was filed within a year after the accident, and therefore the order, etc." This means that a recital of facts by a trial court which actually has no basis in fact and which is made *ex parte* is conclusive as to every fact stated in such recital. Obviously this would lead to injustice. The recital of facts in the order setting the case down for a hearing, page 4 of State of Case, was merely to show on the face of it that the statute had been followed to the extent at least that the date of hearing was not less than three weeks off from the time of signing order. The trial Court had a right to assume that the statute was followed and his mere signing of the order did not change the rights of the parties. As a matter of fact he did not consider that there was a filing when he signed the order because he afterward dismissed the petition. The trial Court did not certify to anything but assuming the truth of the recital he signed the order. In this case, also, as in the Hendrickson case, 87

L., page 366, the necessity of filing appeared because on March 10 the papers were filed. The court cannot consider that this was merely filing the return of sheriff because the Compensation Act does not make provision for that but it does make provision for the filing of the petition.

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:s v. Liquor,
.l. 99 Atl.
.24.

The next point is that thus a statutory proceeding and the trial court only receives such powers as the Act actually gives. The statute provided a filing with the clerk and that must be done or there is no compliance with the Act. Why make provision for this if the legislature had not thought it a necessary procedure? The trial court had no common law powers applicable to the filing of this paper, because the legislature had designated a certain thing to be done, namely to file it with the clerk. What the trial court considered ~~in~~ or the attorney has no bearing on the interpretation of the statute. It must be followed or the person claiming compensation takes no benefit under it. It is in derogation of the common law and should be strictly construed.

The Hendrickson case seems to apply in every particular to the one at bar, and therefore we most respectfully contend that the judgment of the Supreme Court should be set aside and that of the Common Pleas affirmed in every particular.

Respectfully submitted,

KALISCH & KALISCH.

On the brief,

ISIDOR KALISCH.

F A C T S .

On March 9th, 1914, the respondent herein was injured while in the employ of the appellant. A petition and order were signed by Court and served March 8th, 1915, which were filed in Union County Clerk's Office March 10th 1915. An answer setting up the defense that petition was not filed within time prescribed by Compensation Act was filed and subsequently on May 29th, 1915 the petition was dismissed by Common Pleas Court of Union County. See p. 10, 11, 12 and 13 of State of Case.

Justice Bergen, on certiorari, reversed this ruling and our appeal is from the latter's decision.

INDEX.

Petition.

Filed March 10, 1915.

Union County Court of Common Pleas.

MICHAEL J. COONEY, *Petitioner,* *vs.* SAMUEL W. RUSHMORE, formerly trading as Rushmore Dynamo Works, *Respondent.*	*On Petition for Compensation, etc., under Employers' Liability Act. Petition.*

10

To His Honor James C. Connolly, Judge of the Court of Common Pleas of the County of Union and State of New Jersey:

20

Your petitioner, Michael J. Cooney, respectfully shows:

FIRST. That he resides at No. 664 West Fourth street, in the City of Plainfield, County of Union and State of New Jersey, and that on the ninth day of March, 1914, he was employed by the respondent at his place of business in the City of Plainfield, County of Union and State of New Jersey, as a foreman; that as said foreman he had charge of the men working upon the drill presses and milling machines of said respondent.

30

SECOND. That on the day and year aforesaid, while so employed and while in the act of setting up work for one of the men employed upon a milling machine of respondent, your petitioner's left arm, accidentally and without any wilful negligence on the part of your petitioner,

40

was caught in the circular saw of said milling machine and cut and lacerated a depth of one-half inch from the elbow to the palm of the hand, whereby the cords of said hand became contracted, causing the four fingers of the left hand to become stiffened and useless to your petitioner. That at the time of said injury, he was treated by Albert W. Pittis, the physician called by the respondent to attend him, and continued under his care and treatment until on or about April 3rd, 1914, when the said physician advised your petitioner that he could again resume his occupation with respondent, and that it would be but a short time when he would be fully recovered from his injuries; that on or about April 6th, 1914, your petitioner returned to work with the respondent and continued to work until on or about December 23rd, 1914, when he was compelled to stop working longer because he could not perform the work then required of him on account of the injuries sustained by him on the day and date aforesaid and from said last date of December 23rd, 1914, your petitioner has been totally unable to work.

THIRD. That as a result of said accident your petitioner has been deprived of the use of his left hand.

FOURTH. That the said respondent, Samuel W. Rushmore, has had actual knowledge of the said injury.

FIFTH. That at the time of said injury and prior thereto, your petitioner received as compensation from said respondent wages at the rate of nineteen dollars and twenty-five cents per week.

SIXTH. That your petitioner and said respondent have failed to agree upon the amount

of compensation due to your petitioner for his said injuries.

SEVENTH. Your petitioner therefore prays that your Honor will determine the amount of compensation due to your petitioner from the said respondent, under the act entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of the employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911, and the acts supplemental thereto and amendatory thereof, and that your petitioner may be awarded his costs in this proceeding, and such other or further relief as may be proper.

And your petitioner will ever pray, etc.

MICHAEL J. COONEY,
Petitioner.

JNO. P. OWENS,
Attorney of Petitioner.

STATE OF NEW JERSEY,
COUNTY OF UNION. } *ss.*

Michael J. Cooney, of full age, being duly sworn according to law, on his oath deposes and says: That he is the petitioner named in the foregoing petition, that he has read the same and is familiar with the contents thereof; and that the matters and things therein set forth are true according to the best of his knowledge and belief.

MICHAEL J. COONEY.

Sworn and subscribed to before me, this eighth day of March, 1915.

CHAS. D. MORRIS,
Commissioner of Deeds for New Jersey.

Order Fixing Time and Place of Hearing.

Filed March 10, 1915.

UNION COUNTY COURT OF COMMON PLEAS.

10

MICHAEL J. COONEY, *Petitioner,* *vs.* SAMUEL W. RUSHMORE, formerly trading as Rushmore Dynamo Works, *Respondent.*	*On Petition for Compensation, etc., under the Employers' Liability Act.* *Order for Hearing.*

20 A petition having been filed in this cause by Michael J. Cooney, petitioner, praying for the compensation payable by Samuel W. Rushmore, the respondent, it is on this eighth day of March, 1915, on motion of John P. Owens, attorney for petitioner,

ORDERED, that the hearing of said matter be and hereby is set down for Friday, the third day of April, 1915, at the Court House, in the City of Elizabeth, at ten o'clock in the forenoon, or as 30 soon thereafter as counsel can be heard. And it is further

ORDERED, that a true, but uncertified copy of this order, together with a copy of the petition, upon which this order is issued, be served upon the respondent, within six days after the date of this order.

JAMES C. CONNOLLY,
Judge of the Union County Court of Common Pleas.

40

Order Fixing Time and Place of Hearing.

Received Union County Sheriff's Office, March 8, 2.12 P. M., 1915, Elizabeth, N. J.

GEORGE C. OTTO,
Sheriff.

I hereby deput and appoint Alexander D. Ayers a special deputy to serve the within writ. 10

Witness my hand and seal this 8th
[L. S.] day of March, A. D. 1915.

Sheriff Union County.

JAS. E. WARNER,
Under Sheriff.

Served the within Pet. and Order upon Samuel W. Rushmore by leaving a true copy thereof at his usual place of abode, No. 604 Belvidere avenue, Plainfield, N. J., with a member of his family above the age of fourteen years, March 8th, 1915. 20

GEORGE C. OTTO,
Sheriff.

By ALEX. D. AYERS,
Special Deputy.

Sheriff's fees, $3.28. 30

40

Stipulation.

Filed March 10, 1915.

UNION COUNTY COURT OF COMMON PLEAS.

10

MICHAEL J. COONEY, *Petitioner,* *vs.* SAMUEL W. RUSHMORE, formerly trading as Rushmore Dynamo Works, *Respondent.*	*On Petition.*

20

It is hereby stipulated and agreed by and between the attorneys of the parties hereto, that the respondent have until April 15th, nineteen hundred and fifteen, in which to file an answer in the above entitled cause.

Dated April 3rd, 1915.

JNO. P. OWENS,
Attorney of Petitioner.

30

KALISCH & KALISCH,
Attorneys of Respondent.

40

Answer.

Filed April 15, 1915.

UNION COUNTY COURT OF COMMON PLEAS.

10

MICHAEL J. COONEY, *Petitioner,* *vs.* SAMUEL W. RUSHMORE, formerly trading as Rushmore Dynamo Works, *Respondent.*	*On Petition.* *Answer.*

20

The respondent answering the petition filed in the above stated cause, says that,

1. The petitioner is not entitled to receive any compensation from this respondent, inasmuch as the petition of said petitioner was not filed within the time prescribed by the Employers' Liability Act of the State of New Jersey, of nineteen hundred and eleven, and the supplements and amendments thereto.

30

KALISCH & KALISCH,
Attorneys of Respondent.

40

Answer.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

ISIDOR KALISCH, being duly sworn on his oath, deposes and says: that he is the agent of the respondent named in the foregoing answer, and that the matters and things therein contained are true to the best of his knowledge and belief.

ISIDOR KALISCH,

Sworn and subscribed to before me
this 14th day of April, A. D. 1915.

SAMUEL PRESS,
Master in Chancery of New Jersey.

Order.

Filed May 4, 1915.

UNION COUNTY COURT OF COMMON PLEAS.

10

MICHAEL J. COONEY, *Petitioner,* *vs.* SAMUEL W. RUSHMORE, formerly trading as Rushmore Dynamo Works, *Respondent.*	*On Petition.* *Order.*

20

It appearing to the Court that the answer of respondent was filed after time, the attorney of petitioner consenting thereto, and application having been made for a date for the hearing of the above cause;

It is on this fourth day of May, nineteen hundred and fifteen, on motion of John P. Owens, attorney for petitioner, ordered that the said cause be, and the same hereby is, set down for hearing on Friday, the fourteenth day of May, nineteen hundred and fifteen, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard.

30

JAMES C. CONNOLLY,
Judge.

40

Conclusions on Motion to Dismiss Petition.

Filed May 29, 1915.

UNION COMMON PLEAS.

10

MICHAEL J. COONEY, *Petitioner,* *vs.* SAMUEL W. RUSHMORE, formerly trading as Rushmore Dynamo Works, *Respondent.*	*On Petition, &c.* *Conclusions on Motion to Dismiss Petition.*

20 Mr. John P. Owens, attorney for petitioner.

Messrs. Kalisch & Kalisch, attorneys for respondent.

On briefs—May 24, 1915.

CONNOLLY, *J.:*

The petitioner was injured while in the employ of the respondent, on the ninth day of March, 1914, and presented his petition to this Court on the eighth day of March of the present year, 30 setting forth the facts upon which he claimed to be entitled to compensation under the Workmen's Compensation Law of 1911 (P. L. 1911, p. 134) and the amendments thereto. Thereupon, an order was made fixing the third day of April as the day for the hearing on said petition. The order, and the petition to which it was annexed, were placed in the hands of the sheriff of Union County on the same day (March 8) as appears by his endorsement thereon, and 40 the following return appears on the back of said

order: "Served the within petition and order upon Samuel W. Rushmore by leaving a true copy thereof at his usual place of abode, No. 604 Belvidere avenue, Plainfield, N. J., with a member of his family above the age of fourteen years, March 8, 1915. George C. Otto, Sheriff, by Alexander D. Ayers, Special Deputy." The filing stamp of the County Clerk appears on the back of the order and reads as follows: "Union County Clerk's Office. Filed March 10, 1915, James C. Calvert, Clerk."

On May 4, 1915, the respondent filed an answer, denying that the petitioner was entitled to receive compensation, on the ground that the petition was not filed within the time prescribed by the Workmen's Compensation Act. On May 14th the matter came up for hearing, and the attorney for the respondent then moved to dismiss the petition, on the ground set forth in the answer.

It appears, as above set forth, that the petition and the order were not filed in the County Clerk's office within one year from the time of the accident, and the respondent insists that paragraph 23 of the Workmen's Compensation Act, as amended in 1913 (P. L., 311), has not been followed. The act in this respect reads as follows: "In case of personal injuries or death, all claims for compensation on account thereof shall be forever barred, unless within one year after accident the parties shall have agreed upon the compensation payable under this act, or unless within one year after accident one of the parties shall have filed a petition for adjudication of compensation as provided herein." It is admitted that the order to which the petition was annexed, upon receiving the signature of

the Judge, was placed in the hands of the Sheriff, for execution, and that he did not file his return or the petition with Clerk until March 10. This was more than a year after the accident.

The respondent further insists that the petition should have been filed with the Clerk before the Court made its order, and that the making of the order within the year does not, of itself, give the petitioner a standing in court.

Paragraph 20 of the Act (P. L. 1913, p. 307) provides as follows: "Either party may present a petition to said Judge, setting forth the names and residences of the parties and the facts relating to employment at the time of the injury, the injury in its extent and character, the amount of wages received at the time of the injury, the knowledge of the employer or notice of the occurrence of said injury, and such other facts as may be necessary and proper for the information of the said Judge, and shall state the matter or matters in dispute and the contention of the petitioner with reference thereto. This petition shall be verified by oath or affirmation of the petitioner. " * * * * * * * * * * Upon the presentation of such petition the same shall be filed with the Clerk of the Court of Common Pleas, and the Judge shall by order fix a time and place for the hearing thereof, not less than three weeks after the date of filing of such petition. A copy of said petition and order shall be served within six days thereafter on the adverse party." * * * * * * * * * * * * *

The questions presented to the Court are now raised for the first time, so far as I can learn, and must be decided by referring to the language of the statute under which the proceeding is instituted. It appears to me that proceedings un-

der the act are not commenced until the petition is filed with the clerk. I am of the opinion that the petition and order may be presented to the Judge at one and the same time, but the petition must be on file within a year after the accident upon which it is based has happened, and the hearing must be for a day not less than three weeks after the filing of the petition. Those portions of the sections of the act quoted above are susceptible of no other construction.

The authorities hold that in an action at law, the issuance of a summons by an attorney, tested in the name of the clerk of the court in which the action is brought, and before the statute of limitations intervenes in such case, is valid, even though the period within which suit must be commenced has expired before the service of such a summons. In other words, where an attorney issues a writ with a present purpose of having it executed, the action will not fail because the service has not been effected until after the statute of limitations has run. But in considering the proceeding before the Court, this difference is to be observed: In an action at law the issuing of the writ marks the commencement of the suit; under the Workmen's Compensation Act, the filing of the petition is the commencement of the proceeding.

There is no suggestion that the delay in filing the petition was in any wise due to the conduct of the respondent.

The petition is dismissed without costs.

Dated May 29, 1915.

Order Dismissing Petition.

Filed December 8, 1916.

UNION COUNTY COURT OF COMMON PLEAS.

10

MICHAEL J. COONEY, *Petitioner,* *vs.* SAMUEL W. RUSHMORE, Trading as Rushmore Dynamo Works, *Respondent.*	*On Petition.* *Order.*

This matter having been argued before me, in the presence of Louis B. Lesser, attorney, representing Kalisch & Kalisch, attorneys for respondent, and it appearing that the parties hereto did not agree upon the compensation payable under the Workmen's Compensation Act, or that within one year after the accident one of the parties filed a petition for adjudication of compensation, as provided by the Workmen's Compensation Act, the respondent's motion to dismiss the petition heretofore filed, is granted, and the same is hereby dismissed, and judgment entered in favor of the respondent and against the petitioner.

20

30

JAMES C. CONNOLLY,
Judge of Union Common Pleas Court.

Dated May 29th, 1915.

Actually entered December 8th, 1916.

40

Writ of Certiorari.

Filed.

NEW JERSEY, *ss.*

(L. S.) THE STATE OF NEW JERSEY, to the Court of Common Pleas of the County of Union and Samuel W. Rushmore, formerly trading at Rushmore Dynamo Works, GREETING: 10

We, being willing, for certain reasons, to be certified of a certain judgment of the Court of Common Pleas rendered at the April Term of the said Court, in the year One Thousand Nine Hundred and Fifteen, wherein it rendered a judgment and order in favor of the defendant, Samuel W. Rushmore, formerly trading as Rushmore Dynamo Works, dismissing the petition filed by Michael J. Cooney to recover compensation from the defendant, Samuel W. Rushmore, formerly trading as Rushmore Dynamo Works, under the Workmen's Compensation Act of the State of New Jersey, approved April fourth, nineteen hundred and eleven; we do command you, therefore, that the aforesaid judgment and order, the conclusions of the Common Pleas Judge and all papers and records in the said cause, together with all things touching and concerning the same, as fully and entirely as before you they remain, to our Justices of our Supreme Court of Judicature, at Trenton, on the second day of December next, you certify and send, together with this writ, that therein may be done what of right and according to the laws of this State should be done. 20 30 40

Return.

WITNESS, WILLIAM S. GUMMERE, Chief Justice of our Supreme Court, this twenty-fifth day of November, nineteen hundred and sixteen.

WILLIAM C. GEBHARDT,
Clerk.

FORT & FORT,
10 *Attorneys for Prosecutor.*

This writ is allowed; let it be sealed.

J. J. BERGEN,
Jus. Sup. Crt.

Service of the within writ is hereby acknowledged this 28th day of November, 1916.

KALISCH & KALISCH,
Attorneys for Defendants.

20 **Return.**

In obedience to the command of this writ, I WILLIAM B. MARTIN, Clerk of the Court of Common Pleas in and for the County of Union, do hereby certify and send to our Justices of our Supreme Court of Judicature at Trenton within mention, the Petition and Order fixing time and place of hearing, Stipulation, Answer, Order of Continuance, Conclusions of the Court and Order
30 for Judgment whereof mention is within made with all things touching and concerning the same, as fully and entirely as they remain in our said Court of Common Pleas.

IN TESTIMONY WHEREOF, I have hereto set my hand and affixed the
(L. S.) seal of said Court, this ninth day of December, A. D., nineteen hundred and sixteen.

WM. B. MARTIN,
40 *Clerk of the Court of Common Pleas of Union County.*

Order Extending Time.

Entered January 6, 1917.

New Jersey Supreme Court.

10

MICHAEL J. COONEY, *Prosecutor,* *vs.* SAMUEL W. RUSHMORE, trading, etc., *et als.,* *Defendants.*	*On Certiorari.* *Order.*

Application being made and it appearing that through unavoidable delay in obtaining an order, which was a necessary part of the return to the writ of certiorari in this case, the said return was not filed within the time fixed by the Court, and counsel for the defendants consenting; It is, on this sixth day of January, 1917, on motion of Fort & Fort, of counsel for the prosecutor, 20

ORDERED, that the time for filing the return to the writ of certiorari allowed in this cause be and the same hereby is extended until the thirteenth day of December, 1916. 30

Let this rule be entered.

J. J. BERGEN,
Justice Supreme Court.

We consent to the entry of the above order.

KALISCH & KALISCH,
Attorneys for Defendants.

40

Stipulation.

Filed.

NEW JERSEY SUPREME COURT.

10 *Between* MICHAEL J. COONEY, *Prosecutor,* *and* SAMUEL W. RUSHMORE, Trading, etc., *et als.,* *Defendant.*	*On Certiorari.* *Stipulation.*

20 IT IS HEREBY stipulated and agreed between the attorneys for the prosecutor and the attorneys for the defendant in the above entitled cause that the argument upon the writ of certiorari granted in the above entitled case shall be brought on before the Honorable James J. Bergen, a Supreme Court Justice, upon the sixth day of January, nineteen hundred and seventeen, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the Court House
30 in Elizabeth, New Jersey, and that the judgment rendered shall be entered as judgment of the above entitled Court and appeal may be taken therefrom.

FORT & FORT,
Attorneys for the Prosecutor.

KALISCH & KALISCH,
Attorneys for the Defendants.

40

Order Extending Time.

NEW JERSEY SUPREME COURT.

MICHAEL J. COONEY, *Prosecutor,* *vs.* SAMUEL W. RUSHMORE, formerly trading as Rushmore Dynamo Works, *Defendants.*	*On Certiorari.* *Order.*

10

Application being made and good cause being shown; It is, on this second day of December, nineteen hundred and sixteen, on motion of Fort & Fort, attorneys for the prosecutor.

20

ORDERED, that the time within which the return to the writ of certiorari granted in the above entitled cause may be filed be and the same hereby is extended until December ninth, nineteen hundred and sixteen; it is further

ORDERED, that either party may have leave to take depositions under the writ on two days' notice.

30

Let this rule be entered.

J. J. BERGEN,
Justice Supreme Court.

40

Affidavit of Commissioner.

December 30, 1916.

Between

MICHAEL J. COONEY,
Petitioner,

10 *vs.*

SAMUEL W. RUSHMORE,
Respondent.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

I, Jesse R. Salmon, a Supreme Court Examiner of the City of Newark, do solemnly swear that I will fairly and impartially take the testimony of such witnesses as appear before me pursuant to verbal notice given in the above entitled cause, and that I will carefully, faithfully and impartially take the depositions of the witnesses appearing before me pursuant to said notice, and will make a true and correct transcript thereof.

Sworn and subscribed before me
this 30th day of December, 1916.

30

Notary Public for the State of New Jersey.

40

December 30, 1916.

UNION COUNTY COURT OF COMMON PLEAS.

Between

MICHAEL J. COONEY,
Petitioner,

vs.

SAMUEL W. RUSHMORE,
Respondent.

10

Appearances:

Messrs. Fort & Fort for the prosecutor.

Messrs. Kalisch & Kalisch for the defendant. 20

CHARLES W. RUNYON, being duly sworn according to law, on his oath says:

Direct examination by Mr. Shipman.

Q What is your business? A Clerk in the County Clerk's office.

Q What county? A Union County.

Q How long have you been employed there? A Seven years. 30

Q What particular part of the office work do you do? A Court work practically, and the filing of cases.

Q In what court? A Common Pleas Circuit.

Q You attend to that personally? A Yes, sir.

Q How long a time? A The last six years.

Q Have you had any experience in the handling of papers in connection with suits un- 40

der the Workmen's Compensation Act? A I handle all the papers under the compensation act that are filed here.

Q What has been the general procedure in the Union Common Pleas so far as you know?

10 *Mr. Kalisch.* Before answering, I wish to interpose an objection as to the general practice or procedure in the Union County Common Pleas Court, on the ground that it has no relevancy to the question in issue in this case. The question is immaterial, incompetent and irrelevant.

A The general procedure has been that two copies have been made to file and handed to the sheriff to serve, and the sheriff after serving one copy has made his return on the origi-
20 nal copy filed with us.

Q What do you mean by copy, copy of what? A He would make out the original copy of the complaint with the judge's order attached, fixing the date of the trial.

Q That is, you mean, the petition? A The petition.

Q Called petition in compensation proceedings? A Yes.

30 Q That goes to the sheriff before it is filed here? A It has been the custom to go to the sheriff before it is filed here, yes.

Q Can you say that has been the custom, the general custom, in every case, so far as you know? A Not in every case, but in most every case.

Q The original petition and order come to your office with the sheriff's return on it? A Yes.

40

Charles W. Runyon, cross.

Q Do you know of any instance where the Common Pleas judge has handed the original petition and order to the clerk himself for filing?

Mr. Kalisch. I object to that. Will you consent on the record that it will not be necessary for me to go through the entire objection mentioning the grounds specifically? 10

Mr. Shipman. The general objection covers all these questions.

Mr. Kalisch. Yes.

Q (Question read.) A No.

Q It is done usually by the sheriff? A Yes, sir.

Cross examination by Mr. Kalisch. 20

Q You said, "In most every case," Mr. Runyon; what were you referring to when you said most every case it has been that way? A There has been some few cases where the original has been filed with us, or with the office, and a duplicate marked a true copy and sent to the sheriff to serve.

Q You are referring to the time, I assume, when this case was instituted? A I mean ever since the Employers' Liability Act went into effect. 30

Q You are familiar with the provision which says that the court shall set the case down for a hearing not less than three weeks after the filing of the petition? A Yes.

Q In those cases where the original petition and order and a copy were given to the sheriff before filing and were served, how did the county clerk's office convince itself that the hear- 40

ing was not set down for a time less than three weeks after the filing? A It didn't make any difference to us when it was set down.

Q In other words, the county clerk will file any petition and order? A Certainly.

Re-direct examination by Mr. Shipman.

10 Q In about how many cases out of all the cases you handle has the original petition been filed here before being sent to the sheriff?

Mr. Kalisch. I make the same general objection; in addition I maintain that the question should refer to a time previous to the filing of this order and petition in this case.

Mr. Shipman. I will strike out the question then, or I will insert this in the question.

20

Q Previous to the date of the filing of the petition in this case, in about how many cases out of the ones you handle was the original petition and order filed with the county clerk before the delivery to the sheriff?

Mr. Kalisch. The same general objection.

A Not over half a dozen.

30 Q How many cases have you handled previous to this case? A About a hundred.

Q About a hundred? A Yes, speaking of this case, about a hundred cases filed ahead of that.

Re-cross examination by Mr. Kalisch.

Q In other words, you mean about six of the hundred were filed first? A Probably six of the hundred were filed with the clerk before they were sent to the sheriff.

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Q Are you speaking of your own knowledge or are you giving us facts elicited by yourself from someone else? A No, I am simply giving you the facts as I understand them without going through the record.

Q So you have not examined the record to be positive about this? A No. 10

Q Had you the entire control of filing previous to the institution of this action? A No.

Q And who had? A Mr. Norman.

Q So that your testimony refers to what you recollect? A Yes, sir.

Q Not from any examination of the records? A Yes.

Re-direct examination by Mr. Shipman.

Q That is your testimony with reference to the number of cases that have been brought under the compensation act? A I can give you the exact number of cases if you want them. 20

Q I would like to have them? A There were 105 cases filed previous to this case.

Q You have examined the record? A Yes, sir.

Further re-cross examination by Mr. Kalisch.

Q Of which you do not know how many were filed first before serving? A Not exactly, but not over three or four. 30

Q That is your recollection? A Yes.

Q And you didn't have actual charge of the filing at that time? A I had actual charge of the cases, but not actual charge of the filing.

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ZERMAN K. NORMAN, being duly sworn on his oath, deposes and says:

Direct examination by Mr. Shipman.

Q You are connected with the county clerk's office here in Union County? A Yes, sir.

10 Q How many years have you been here? A About thirty-five.

Q And you have had actual charge of the filing of papers in the cases brought under the Workmen's Compensation Act? A Yes.

Q Ever since the act was passed? A Yes, sir.

Q What has been the practice in this county relative to the filing of the original petition and order previous to this case?

20 *Mr. Kalisch.* The same objection. Mr. Shipman, it is not necessary for me to give all the grounds?

Mr. Shipman. No, it goes to all questions that bear on this.

A Previous to the trial of this cause and the judgment in this cause the papers, the petition and order evidently was signed before they came to this office and given to the sheriff for service. After service they were filed here; now,

30 since this case—

Q Never mind since. Was that done in every case, to the best of your recollection, prior to this case? A Yes, to the best of my recollection it was. There might have been an occasional difference in the way it was done, but that was the general practice.

Cross examination by Mr. Kalisch.

Q Mr. Runyon has testified that he knows

40 of five or six cases wherein the petition and

order were filed first and then served by the sheriff of the first 105 cases which were previous to this case, is that about correct? A Probably that is so, it might be so; I said in my testimony that there might have been a difference in a few cases, not very many, though.

Q Also, Mr. Norman, you did not consider the paper filed until it was actually presented here and stamped by your office, is that correct. 10

Mr. Shipman. I object to that on the ground that it is a conclusion of law, as to what filing is.

A No.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.*

I hereby certify that the foregoing depositions were taken before me at the Court House in the City of Elizabeth, Union County, New Jersey, on Saturday, December 30, 1916, pursuant to verbal notice given in the presence of Mr. Jehiel G. Shipman, representing Fort & Fort, appearing for the prosecutor, and Mr. Isidor Kalisch, representing the firm of Kalisch & Kalisch, appearing for the defendant. 20

I further certify that the testimony was taken stenographically by me pursuant to a stipulation and I certify that the foregoing testimony is a true and correct transcript of the testimony of the witnesses and the proceedings before me. 30

Dated December 30, 1916.

Supreme Court Examiner of New Jersey.

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Opinion of Justice Bergen.

Filed January 11, 1917.

New Jersey Supreme Court.

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MICHAEL J. COONEY, *Prosecutor,* vs. SAMUEL W. RUSHMORE, Trading as Rushmore Dynamo Works, *Defendant.*	*On Certiorari.*

20 Argued January 6, 1917, before a single Justice as provided by statute.

Fort & Fort for prosecutor.

Kalisch & Kalisch for defendant.

MEM.

BERGEN, *J.:*

The prosecutor caused a petition, praying compensation for injuries as authorized by the 30 Workmen's Compensation Act, with an order of the Court fixing the day for hearing, to be served on the defendant. The only answer interposed was that the petition was not filed with the Clerk of the Court of Common Pleas within one year after the accident. This the Court of Common Pleas sustained and made an order dismissing the petition, which action is now under review, the record having been brought here by a writ of certiorari allowed the petitioner. The 40 facts are not disputed and show that the acci-

dent, the basis of the prosecutor's petition, happened on March 9, 1914, and that his petition was presented to the judge of the Court of Common Pleas March 8, 1915, who on that day made the following order, "A petition having been filed in this cause by Michael J. Cooney, petitioner, praying for the compensation payable by Samuel W. Rushmore, the respondent, it is on this eighth day of March, 1915, on motion of John P. Owens, attorney for petitioner:

Ordered, that the hearing of said matter be and hereby is set down for Friday, the third day of April, 1915, at the Court House in the City of Elizabeth at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, and it is further ordered, that a true, but uncertified copy of this order, together with a copy of the petition, upon which this order is issued, be served upon the respondent, within six days after the date of this order." After the order was signed it, and the petition, was given to the sheriff of the County of Union to be served on the defendant. It was properly served on March 8, 1915, but the sheriff did not return the original petition and order to the clerk until March 10, 1915, who marked it filed as of that date.

The only question to be determined is whether the petition is to be considered as filed on March 8th when it was presented to the Judge of the Court, for if it was then the order under review, and the judgment thereon should be set aside.

The return made by the sheriff was not a filing of the petition and order, for he had no authority to do more than make a return of the character of the service he had made.

Section 18 of the Workmen's Compensation Act, 1911, P. L. 134, provides that in case of

dispute concerning the claim of an injured employee "Either party may submit the claim" to a Judge of the Court of Common Pleas of the county, who is empowered to hear and determine the dispute in a summary manner. The method of procedure appears in section 20 of the Act, as amended in 1913, P. L. 302, which, after providing that either party may present a petition, declares that, "Upon the presentation of such a petition the same shall be filed with the Clerk of the Court of Common Pleas, and the Judge shall by order fix a time and place for the hearing. * * * * * * A copy of said petition and order shall be served as summons in a civil action and may be served within six days thereafter upon the adverse party," and the last paragraph of the amending act of 1913 provides that all such claims, "Shall be forever barred unless within one year after the accident the parties shall have agreed upon the compensation payable under this act, or unless within one year after the accident one of the parties shall have filed a petition for the adjudication of compensation as provided herein."

While the statute is perhaps not as definite on the subject as it might be, I am of the opinion that while the proceeding is statutory the jurisdiction in these matters is conferred on the Court of Common Pleas and not on the Judge, for although the petition must be presented to a Judge of that Court, the record is that of the Court; the petition is to be filed with the Clerk of the Court of Common Pleas, and the judgment is to be entered in that Court, on the findings of the Judge, the same as in cases tried in that Court, while Section 21 of the Act provides

that the compensation may be commuted by said "Court of Common Pleas," and to make the statute consistent and workable we must assume that the Legislature, in providing this new method of compensation and the means for its enforcement, vested the jurisdiction in the Court of Common Pleas and not in a Judge of that Court as a distinct tribunal. The case of Hendrickson *v.* Pub. Ser. Ry. Co., 87, L. 366, is not applicable to the present situation, for in that case the Court made an order that the petition be filed with the Clerk of the Court of Common Pleas and this was not done within one year, nor does it appear that any order was made declaring that the petition was filed and fixing a time for hearing. The decision in that case was put upon the ground that neither the Judge or the petitioner considered the presentation of the petition as a filing, in fact the contrary appeared for the Court made an order that it be filed.

In the case under consideration the Court, after the presentation of the petition, acted upon it as if filed with the Clerk, and stated in the order that it had been filed. The orderly proceeding under this statute seems to be the presentation of the petition to the Judge, its filing with the Clerk of the Court of Common Pleas, followed by the making of the order by the Judge fixing a day for hearing. In this case the petition was presented to the Judge, and he certifies that it was filed and thereupon made the order fixing the date for hearing, which he could only make after the petition was filed with the Clerk. The certificate of the Judge that the petition was filed, is in my judgment just as effective as if he, as the Judge of the Court of Common

Pleas, had endorsed the date of filing on the petition. When the petition was presented, adjudged to be on file, and the order made fixing the day of hearing, the petition and order passed beyond the petitioner's control and he could not, at least without an order, withdraw them from the files. The fact that the Clerk did not endorse on the petition the date of filing is, in my judgment, of no consequence if it was in fact filed with the Clerk of the Court, as the Judge thereof determined before he acted it.

The statute must be given a reasonable construction, and when a petition is presented to the Judge of the Court and he not only certifies that it has been filed, but acts upon it as he only could after it was filed, the petition becomes a record of the Court from that date, and is to be taken as filed with the Clerk of the Court at the time when the Court certifies that it was filed. The only other difficulty presented is that the original petition and order were removed from the files and given to the sheriff in order that he might make service of a copy thereof. As the petition and order constitute the only writ or process in actions of this kind, they were probably taken by the sheriff to be exhibited to the defendant in case of personal service, but if this was not necessary the petitioner cannot be deprived of his rights arising from the filing because the sheriff made such a temporary use of the petition and order. Both were served within the year and the defendant then had notice that such a petition had been filed, for the order so stated, and also that he was required to answer. The endorsement made by the County Clerk on March 10, 1915, indicated the date of the filing of the return by the sheriff. My opinion is that,

where the petition is presented to the Judge of the Court of Common Pleas and he certifies that it has been filed and thereupon makes an order which he can only make after such filing, the petition must be taken to have been filed on the date certified by the Court, and that in this case the petition was filed within a year after the accident and therefore the order and judgment of the Court of Common Pleas now under review should be set aside.

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Order of Reversal.

Entered January 13, 1917.

NEW JERSEY SUPREME COURT.

10 MICHAEL J. COONEY, *Prosecutor,* *and* SAMUEL W. RUSHMORE, formerly trading as Rushmore Dynamo Works, *Defendants.*	*On Certiorari.* *Order of Reversal.*

20 A writ of certiorari having been granted in this case and the matter being argued orally on January 6th, 1917, before the Honorable James J. Bergen, Supreme Court Justice, sitting for the Court, pursuant to the statute, and Fort & Fort, appearing for the prosecutor, and Kalisch & Kalisch, for the defendants, and the Court having examined the record and proceedings and the judgment below and the reasons for reversal assigned, it is thereupon on this 13th 30 day of January, 1917, on motion of Fort & Fort, attorneys for the prosecutor, ORDERED that the judgment of the Union County Court of Common Pleas, dated May 29th, 1915, and filed December 8, 1916, be in all things reversed, set aside and for nothing holden, and that the record and proceedings be remitted to the Union County Court of Common Pleas to be proceeded

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with in accordance with this judgment with the practice of the said Court.

Entered January 13, 1917.

On motion of

FORT & FORT,
Attorneys of Prosecutor. 10

A true copy.

WM. C. GEBHARDT,
Clerk.

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Notice and Grounds of Appeal.

Filed February 17, 1917.

NEW JERSEY SUPREME COURT.

10 MICHAEL J. COONEY, *Prosecutor-Appellee,* *vs.* SAMUEL W. RUSHMORE, Trading as Rushmore Dynamo Works, *Defendant-Appellant.*	*On Certiorari.* *Notice of Appeal and Reasons.*

To FORT & FORT,
Attorneys of Prosecutor-Appellee.

20 PLEASE TAKE NOTICE, that the defendant-appellant appeals from the entire judgment entered in the New Jersey Supreme Court, to the Court of Errors and Appeals, on the following grounds:

1. Because the New Jersey Supreme Court erroneously and improperly held that the above mentioned Michael J. Cooney filed a petition within a year from March 9th, 1914, in the Union 30 County Common Pleas Court, for compensation against the above mentioned Samuel W. Rushmore, trading, &c.

2. Because the New Jersey Supreme Court erroneously and improperly held that the action of the above mentioned Michael J. Cooney under the Workmen's Compensation Act of the State of New Jersey, was not outlawed.

3. Because the New Jersey Supreme Court erroneously and improperly held that a Com- 40 mon Pleas Judge may consider petition filed un-

der the Workmen's Compensation Act within one year after an accident or injury, although the petition and order was not actually filed in the County Clerk's office until after one year from the said date of accident and injury.

4. Because the New Jersey Supreme Court erroneously and improperly held that if a petition and order is served upon an employer within a year after an accident and injury to an employee, although the said petition and order is not filed in the County Clerk's office in the county where the accident is instituted, until after a year from the date of accident and injury, that the employer is duly served with process and is in Court.

5. Because the New Jersey Supreme Court erroneously and improperly held that a Common Pleas Judge, under the Workmen's Compensation Act of New Jersey, may mark a petition and order filed without the same being filed with the County Clerk of said county.

6. Because the New Jersey Supreme Court erroneously and improperly held that a Common Pleas Court, under the Workmen's Compensation Act, may consider a petition filed, though not filed in the County Clerk's office, and thereupon make an order for a hearing of the merits of the petitioner's claim for compensation.

7. Because the New Jersey Supreme Court erroneously and improperly held that where a Common Pleas Judge recited in an order for a hearing that a petition has been filed, and thereupon makes a further order setting the case down for a hearing, even though the petition has not been filed, that this was a sufficient compliance with the Workmen's Compensation Act

requiring a filing of a petition within one year after the injury by an injured employee.

8. Because the New Jersey Supreme Court erroneously and improperly held that the endorsement made by the County Clerk on March 10th, 1915, indicated the date of the filing of the return by the sheriff, whereas the endorsement indicated the date of the filing of the petition.

9. Because the New Jersey Supreme Court erroneously and improperly held that, where the petition is presented to the Court of Common Pleas and he certifies that it has been filed and thereupon makes an order which he can only make after such filing, the petition must be taken to have been filed on the date certified by the Court, and that in this case the petition was filed within a year after the accident.

10. Because the judgment is in divers other respects illegal, erroneous and oppressive to the above mentioned defendant-appellant.

KALISCH & KALISCH,

Attorneys of Defendant-Appellant.

Service acknowledged, January 27, 1917.

FORT & FORT,

Attorneys of Prosecutor-Appellant.