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Notice of Appeal.

Filed November 10, 1916.

New Jersey Supreme Court.

RUSSELL A. GILLETTE, *Plaintiff,* *vs.* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, *Defendant.*	*Action at Law.* *Notice of Appeal.*

To Frederic B. Scott, Esquire, attorney of defendant.

Take notice, that the plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the twenty-fifth day of October, nineteen hundred and sixteen, on the following grounds:

1. Because the Circuit Court judge, before whom said cause was moved, after allowing the counsel for the defendant to amend the answer filed in this cause in the following particular:

> "And for a second and separate defense the said defendant says that the plaintiff ought not to have or maintain his action against it because the above action was not brought or instituted within the period of two years from the time of the happening of the alleged accident to the plaintiff."

And after further granting leave to the counsel for the defendant to amend the answer in the transcript in this cause by adding a seventh and separate defense, which read as follows:

> "And for a seventh and separate defense the said defendant says that the plaintiff ought not to have or maintain his action against the defendant because the above action was not brought or instituted within two years after the removal of the said plaintiff's alleged disability as a minor."

Held, that the said defense was a complete bar and that a motion of non-suit, in behalf of the defendant, should be allowed.

2. Because the Circuit Court judge, before whom said cause was moved, after allowing counsel for the defendant to amend the answer filed in this cause as above stated, denied the motion of counsel for the plaintiff to strike out said second and separate defense.

3. Because the Circuit Court judge, before whom said cause was moved erroneously granted the defendant's motion for a non-suit in favor of the defendant on the opening of said cause to the jury by the counsel of the plaintiff.

4. Because the Circuit Court judge erroneously directed a verdict of non-suit upon the motion of the counsel for the defendant for said direction.

5. Because the judgment below is in divers other respects illegal, unjust and improper.

Dated November 2d, 1916.

JAMES R. MULLIGAN,
Attorney of Plaintiff.

Summons.

Judgment Record.

NEW JERSEY SUPREME COURT,
BERGEN COUNTY.

RUSSELL A. GILLETTE, *vs.* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,	*Judgment Record.* *Judgment of Non-suit.* *James R. Mulligan, Attorney.*

Delaware, Lackawanna and Western Railroad Company, the defendant in this cause, was summoned to answer unto Russell A. Gillette, the plaintiff therein, in an action at law upon the following complaint:

Summons.

Issued July 11. 1916.

The plaintiff, Russell A. Gillette, residing at No. 253 Court avenue, in the Town of Lyndhurst, Bergen County, New Jersey, says that:

1. The defendant on October 6, 1910, was and still is a corporation; and on the date stated, in the Town of Lyndhurst, in the County of Bergen and State of New Jersey was engaged in the business of common carrier by railroad and was and still is engaged in commerce between the states of New York, New Jersey, Pennsylvania and other states of the United States of America, and the said defendant then and there owned, possessed and had the management and control of a certain rail-

road with appurtenant work shops and repair shops incidental to and necessary for the management and operation of said railroad; said work shops were situated at Kingsland, in said county, and known as the Kingsland Shops, being an important adjunct to and integral part of the said Delaware, Lackawanna & Western Railroad Company system for the control of said railroad and which shops were then and there operated and used by it in such business of common carrier and in such Interstate Commerce as aforesaid.

2. That the said defendant then and there employed divers large numbers of servants and agents to manage, operate and run its said railroad in its business of common carrier as aforesaid and in Interstate Commerce as aforesaid; and that the plaintiff was on October 6, 1910, a resident of the State of New Jersey, and was then and there employed in such commerce by the defendant in the capacity of a machinist apprentice, acting under the orders and directions of the said defendant and being so employed, the plaintiff was engaged in aforesaid commerce in and about repairing of certain locomotives, part of the equipment of said defendant and used by it in aforesaid commerce, and being so engaged, under defendant's orders and directions was attempting to set a heavy lubricator up and upon one of such locomotives then and there being in a partially dismantled condition and being repaired in said Kingsland Shops and the injuries hereinafter mentioned were received and suffered by the plaintiff while employed in such commerce and were inflicted by the said defendant through its officers, agents and employees while the said plaintiff was so employed in such commerce by

the said defendant as such common carrier in such commerce between the aforesaid states.

3. That the plaintiff at the time of said injury was an immature youth, being 16 years, 2½ months old, and it then and there became the duty of the defendant to provide and maintain a reasonably safe and suitable place for the plaintiff to work in and also to provide safe, suitable and reliable tools, ladders and proper equipment for use by plaintiff in and about such duties as he was ordered to perform; and the said employment of plaintiff was exceedingly dangerous and hazardous if he were not carefully and properly protected, guarded and warned of the probable dangers of said employment before they became actual dangers; and it then and there became and was the duty of the said defendant to provide and maintain places and equipment both properly inspected; and to protect, warn and guard the plaintiff in and about such work as he was directed to perform, warning him of the probable dangers of said employment before such dangers became actual dangers, so that he would not be exposed to extreme and unnecessary dangers of life and bodily peril neither required or contemplated in the employment of such an immature youth.

4. Yet the said defendant then and there disregarded its duty in this behalf in that it did not provide, maintain and furnish a properly inspected place nor secure properly inspected and safe equipment and tools for plaintiff's use, nor did the defendant properly warn, notify, protect nor guard said plaintiff in his dangerous employment nor did it give the plaintiff reasonable warning and notice of the probable dangers of his said employment before the

said probable dangers became actual dangers; and the plaintiff was thereby subjected and exposed to extreme, unnecessary and unwarranted peril, neither required nor contemplated by his said employment, and thereby while the said plaintiff was so employed in such commerce as aforesaid at the place aforesaid and while the defendant was such common carrier and engaged in commerce between the aforesaid states and while the plaintiff was engaged in his said work in and about the repairing of the said certain locomotive and was climbing a ladder placed against said locomotive, the foot of which ladder was resting in a slippery place owing to the damp, oily and greasy condition of the platform surrounding the locomotive pit and while the plaintiff was endeavoring to carry on his shoulder under the orders and directions of the defendant, a certain heavy lubricator, which he purposed to set in place upon said locomotive, which was so dismantled as not to have either a running board or a cab for protection and support, through the aforesaid negligence of the said defendant in not providing a properly inspected and safe place for work and in failing to give reasonable warning and notice of the probable dangers as aforesaid and in not furnishing and supplying the plaintiff with a properly inspected and constructed ladder of sufficient strength and stability, with proper safeguards to prevent the same from slipping when used in a dangerous and slippery place and position, the said plaintiff was hurled from said ladder by the breaking and giving away of said ladder under the weight of the plaintiff and the additional load of the heavy lubricator, which the plaintiff was carrying, and the plaintiff was dashed to the

ground beside said locomotive and thereby suffered a fracture of his right kneecap, a dislocation of the joint of his right leg and was otherwise so bruised and lamed that he was under the care and treatment of physicians in a public hospital for nearly a month, and he has become, in consequence of such injuries, permanently disabled and disfigured.

5. That by reason of said injuries plaintiff has been prevented for a long time from attending to his business, was obliged to spend $200 for medical attendance and care and medicines, suffered great pain and will in the future suffer great pain and be prevented from undertaking any arduous occupation or trade, and has been made and will remain a cripple for life.

6. That the plaintiff at the time of said injuries complained of was a minor and did not become of legal age until July 21, 1915.

7. That this action was commenced within two years of the date of the plaintiff's coming of age and the removal of the disability of plaintiff's infancy in force at the accrual of the cause of action aforesaid, wherefore and by virtue of an Act of the Congress of the United States of America entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," being a public act and approved April 22, 1908, and the supplements thereto and the amendments thereof, an action has accrued to the said plaintiff to demand and have of and from the said defendant the sum of money herein demanded in manner and form as is demanded.

8. The plaintiff demands as damages $25,000.

JAMES R. MULLIGAN,
Attorney of Plaintiff.

(Filed July 13, 1916.)

Answer.

Filed July 25, 1916.

The above defendant, The Delaware, Lackawanna & Western Railroad Company, answering the allegations contained in the plaintiff's complaint, says that:

1. It admits all the allegations in the first paragraph of the plaintiff's complaint, except,

> "being an important adjunct to and an integral part of the said Delaware, Lackawanna & Western Railroad Company system for the control of said railroad and which shops were then and there operated and used by it in such business of common carrier and in such Interstate Commerce as aforesaid."

2. The defendant denies the allegations in the second paragraph of the plaintiff's complaint.

3. The defendant denies the allegations in the third paragraph of the plaintiff's complaint.

4. The defendant denies the allegations in the fourth paragraph of the plaintiff's complaint.

5. The defendant denies the allegations in the fifth paragraph of the plaintiff's complaint.

6. The defendant denies the allegations in the sixth paragraph of the plaintiff's complaint.

7. The defendant denies the allegations in the seventh paragraph of the plaintiff's complaint.

And for a second and separate defense, the said defendant says that the said plaintiff ought not to have or maintain his action against it because the above action was not brought or

instituted within the period of two years from the time of the happening of the alleged accident to the plaintiff or within two years from the time of the happening of said accident after the removal of the said plaintiff's disability as a minor.

And for a third and separate defense, this defendant says that neither it nor the said plaintiff were engaged in interstate commerce at the time of the alleged accident and injury to said plaintiff.

And for a fourth and separate defense, this defendant says that said plaintiff ought not to have or maintain its aforesaid action against it because the said plaintiff voluntarily took upon himself, encountered and incurred the risk to which his injury was due and that he waived all and any right of action which he may have acquired by said injury.

And for a fifth and separate defense, this defendant says that the said plaintiff ought not to have or maintain his aforesaid action against it, because he, the said plaintiff, assumed the risk of the injury which happened and befell him while working at this defendant's Kingsland shop on October 6th, 1910.

And for a sixth and separate defense, this defendant says that the said plaintiff was guilty of gross contributory negligence in this, that he voluntarily took a position with regard to the doing of his work in the said Kingsland shop just prior to the happening of the injury as is alleged to have happened to him, that was neither necessary, proper, expedient or reasonable, thereby bringing upon himself the very injury of which he now complains.

Reply.

Wherefore, and for the reasons hereinbefore set out, this defendant says that the above suit should be dismissed against it.

FREDERIC B. SCOTT,
Attorney of Defendant.

(Filed July 25, 1916.)

Reply.

Filed August 15, 1916.

The above plaintiff, Russell A. Gillette, in reply to the answer filed herein by the above named defendant, says as follows:

1. The plaintiff joins issue on the denials in the 7 paragraphs set out as a first defense in its answer by the above defendant.

2. The plaintiff denies the allegations set out for a second and separate defense in said answer.

3. The plaintiff denies the allegations set out for a third and separate defense in said answer.

4. The plaintiff denies the allegations set out for a fourth and separate defense in said answer.

5. The plaintiff denies the allegations set out for a fifth and separate defense in said answer.

6. The plaintiff denies the allegations set out for a sixth and separate defense in said answer.

JAMES R. MULLIGAN,
Attorney of Plaintiff.

(Filed August 15. 1916.)

Judgment.

This action came regularly on for trial on the 25th day of September, 1916, before the Honorable Luther A. Campbell, Judge, at the Bergen Circuit Court.

On the opening of said cause to the jury by the plaintiff's counsel, the defendant made a motion to direct a non-suit in favor of the defendant and against the said plaintiff, which non-suit was accordingly ordered and directed by the court.

Whereupon, it is adjudged that the complaint of the plaintiff be dismissed.

WM. S. GUMMERE,
C. J.

No costs.

Judgment entered October 25th, 1916.

I, William C. Gebhardt, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal and also a copy of the judgment entered in the above stated cause as the same remains on file and of record in my office.

In testimony whereof, I have set my hand and seal of said Court at Trenton, this fifteenth day of November, A. D. nineteen hundred and sixteen.

WM. C. GEBHARDT,
[L. S.] *Clerk.*

Bergen County Circuit Court.

RUSSELL A. GILLETTE,
Plaintiff,

vs.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant.

Transcript of shorthand notes of testimony and proceedings taken at the trial of the above entitled cause, at the court house in Hackensack, N. J., on September 22nd and 25th, 1916.

Before HON. LUTHER A. CAMPBELL, Judge, and a jury.

For the plaintiff, James R. Mulligan.

For the defendant, Frederic B. Scott.

Mr. Scott. I served Mr. Mulligan with a notice that on the trial of the case I would move to amend my answer filed in this case, in the following particular:

> "And for a second and separate defense the said defendant says that the plaintiff ought not to have or maintain his action against it because the above action was not brought or instituted within the period of two years from the time of the happening of the alleged accident to the plaintiff."

And said defendant further will seek for leave to amend the transcript in this case by adding a

seventh and separate defense, which seventh or separate defense shall read as follows:

> "And for a seventh and separate defense, the said defendant says that the plaintiff ought not to have or maintain his action against the defendant because the above action was not brought or instituted within two years after the removal of the said plaintiff's alleged disability as a minor."

In other words, I have separated my second defense into two separate defenses.

The Court. That brings us to the question of limitation, and if I gather it, roughly it is this: That under the Railroad Act, there is no exception in the statute; while there may be under the general statute of limitation, as to ordinary actions, there is none under the Railroad Act.

Mr. Scott. And not under the Federal Employers Liability Act.

The Court. The amendment may take place.

Mr. Scott. I desire to read the following stipulation on the record:

> It is stipulated by the parties that the engine in question in this suit, No. 72, was regularly used in interstate commerce; but it was temporarily in the Kingsland shops of the defendant company for repairs at the time of the injury complained of by the plaintiff, and that said engine was an instrumentality of interstate commerce within the Act of Congress of 1908, pleaded in this case.

Mr. Mulligan. May we not open on Monday, when it will be fresh in the minds of the jury?

The Court. Well, the opening is not going to be long; all right, take our recess until Monday morning, 10 o'clock.

Hackensack, N. J., Sept. 25, 1916, 10 A. M.

Mr. Mulligan. Did your Honor have a chance to look at that Federal case that I cited?

The Court. I have not.

Mr. Scott. May I inquire of the Court the status of the argument now pending before the court? Mr. Mulligan is talking about different authority; is the case in such a position as to be disposed of by the Court on the citation of authority?

The Court. Well, that is the impression I had, Mr. Scott. When we left the matter on Friday, one of the defenses raised by you was that he was out of time with his action.

Mr. Scott. Yes, sir, and then we informally discussed the matter.

The Court. Yes. I understood from Mr. Mulligan that he was not disputing the facts; in fact, I do not see that he can, so far as they apply to the plea which you have pleaded, because his pleadings seem to establish that.

Mr. Scott. Mr. Mulligan then concedes on this preliminary argument before the Court that if the Court should come to the conclusion that his action was not maintainable, then he withdraws the action? Is that what I understand?

The Court. I do not understand what he is getting at. Aren't you in this position: Isn't this a defense that you would have urged on a motion to strike out? That is the way I understand it is before me. So that if I should find

that your contention is correct, you are either entitled to a judgment or he may desire to move for a non-suit, or withdraw a juror and discontinue his action. I understand now, Mr. Mulligan, that you are not disputing—nor do I see really how you can—the facts when will be before the Court in passing upon this question, because you alleged the time of the casualty as October 6th, 1910; the day of the summons, which is the commencement of the action, so far as we are concerned, is July 11th, 1916, a matter of something over five years from the time of the arising of the cause of action; and Mr. Scott says that two years is the extreme time that can elapse under the act under which you are complaining; as the extreme time in which an action may be brought and maintained. Isn't that the situation?

Mr. Mulligan. Yes.

Mr. Scott. Yes.

The Court. I want to say to you, Mr. Mulligan— and I am going to hear you, of course— the question in my mind, and which did not occur to me on Friday when we were discussing the matter is this: As you can readily see, and I cannot help but gather from the facts, you are contending entirely and solely under the Federal Employers Liability, in which the time is limited to two years in which the action may be maintained. The statute, as I understand it, in that particular, reads as follows:

> "No action shall be maintained under this act, unless commenced within two years from the day the cause of action accrued."

(Then followed arguments on the question of limitation; after which the following colloquy):

The Court. I think, Mr. Mulligan, I am going to stand upon my view, and that is that the defendant should prevail under the defense that they have urged. Which defense is that, Mr. Scott?

Mr. Scott. The one I urged in my motion to amend my answer for the second defense.

I asked leave to amend my second defense to state "And for a second and separate defense the said defendant says that the plaintiff ought not to have or maintain his action."

The Court. The proper finding upon such a holding would be—what? We have a jury here. What would be the proper finding in the situation as we have it here? We have a jury empanelled and you have urged your second defense as a complete and absolute bar to the action, haven't you?

Mr. Scott. Yes, sir. But the situation, as I saw it this morning—so far as your Honor conceived the situation in the pleadings—I merely have sought to amend my answer. I have not reserved, as the Practice Act says, a right to strike out or dismiss the plaintiff's action on the trial.

The Court. What position are you putting this in? Are you leaving your second defense in?

Mr. Scott. I am leaving my second defense.

The Court. Do I understand that you still desire to go on with the trial of the issue, if I am going to hold that your second defense is a complete one?

Mr. Scott. No.

The Court. If I am indicating or holding that your second defense is a complete defense, what is the proper judgment—

Mr. Mulligan. I move to strike out the second and separate defense which he proposes to enter, and then get a judgment on the pleadings. We will waive any formality of notice.

Mr. Scott. I think if Mr. Mulligan opens and makes a statement of the facts, I can ask the Court to direct.

All I want is to get the case in that shape which will be the most convenient, as well as proper, way of disposing of this matter so that if an appeal is decided, it may be readily taken.

Mr. Scott. Well, I had planned that when Mr. Mulligan made his opening to the jury, to ask the Court to dismiss his action.

The Court. Because of the reasons urged in the second defense?

Mr. Scott. For the reason set forth before the jury.

Mr. Mulligan. I don't want to bring anything else in before the Court.

Mr. Scott. That would include his statement and the pleadings.

The Court. I am inclined to think that is the most direct and better way of doing it. You are not in any way prejudiced, and naturally, are not doing anything more than reading the pleadings and getting the facts before the jury.

Mr. Mulligan. Gentlemen of the jury, the plaintiff, Russell Gillette, six years ago, entered the employment of the D., L. & W. Railroad Company in the Kingsland repair shops, west of Rutherford, in this county. He was then six-

teen years old, just passed sixteen years of age; worked for a month under the direction of a foreman at the time, and after the month of September he was put under a man named Al. Waters and told to do as he directed. His position was a machinist apprentice; he reported to Waters, after finishing each of the jobs directed by him, and then would go to see him for any other additional work in the course of the day.

On the morning of October 6, 1910, he came to work at half-past seven, and did a few odd jobs that were assigned to him, and then we come to the period of the accident. In this shop, repair yard or shops, there were, I understand, two tracks, running parallel to each other, and some of these tracks had excavations underneath them, pits; they ran locomotives on to them, and then the repairmen would go underneath and fix the wheels, springs, or whatever was directed.

About half-past eight, while he was working on engine No. 72, I believe it was, which had been dismantled and taken in the shop for repairs, and the cab taken off and repairs made, he saw Waters and Waters said, "go and get the lubricator, put it on seventy-two." This young fellow, sixteen years old, never saw a lubricator on an engine. He said, "where will I put it?" Waters pointed to the lubricator, directed him in the center of the boiler, and said, "there." He said, "How will I get it there?" He said, "Get a ladder; you used a ladder yesterday." So he goes to the shop and gets the lubricator and brings it out; it is a heavy contrivance, weighing about sixty pounds, with various small pipes running to all parts of the

engine, and under pressure of steam the oil is forced through the different parts of the lubricator. He gets the ladder—I should imagine the engineer is facing in this direction (illustrating); there is no tender; this is the rear (indicating) it is over the pit on the rails. He goes to the rear and gets the ladder, brings it around on the right-hand side of the locomotive, puts it on the side of the boiler, and then takes the lubricator on his left shoulder and starts up the ladder. The fourth rung of the ladder is not in the ladder, and he misses it when he is climbing, he sees that it is gone, and he lowers the lubricator, puts it on his hip, and then reaches out to climb from there to the bracket; he could not reach the bracket; just then the ladder gives way and he comes down with a crash, and his foot goes through and his knee-cap is broken. It developes, or it appears that there was a lot of muck around the side of the pit, this platform, brick platform, was full of drainage of oil and water from the engine, muck and dirt. There were no cleats in the foot of the ladder to hold it. He tries to get up; three men come around and take him into the shop to give him first aid, what little they can do. They put him in a chair, and then he stays outside for an hour and a half waiting for the express to take him to Hoboken. Well, the train stops and takes him to Hoboken and he goes to the emergency hospital, and Doctor Arlitz treats him, and then he goes to St. Mary's Hospital and is treated for a month. His father brings him home to Lyndhurst and he doesn't work for two years. He hobbles around the house on crutches, and he could not get a position; could not use his leg; could not stand on it. He is in pain and suffering

while he is walking; there is only a certain position he can keep it in. I think for the purposes of this opening that will be enough. If we show those facts, we will ask a verdict at your hands.

The Court. Did you say, Mr. Mulligan, that this suit was brought on July 11th, 1916?

Mr. Mulligan. Yes. The accident happened on October 6th, 1910. The suit was begun on the 11th day of July, 1916. The plaintiff became of age on July 21, 1915, and brings suit therefor, one year after he became of age. Our contention is that the statute of limitation has not run until he became of age, namely, July 10, 1916, and it is a question of law.

The Court. Is there anything else that you think you want on the record?

Mr. Scott. Except that the railroad company admits that—

The Court. That is already in.

Mr. Mulligan. I will not put in the interrogatories taken.

Mr. Scott. May it please the Court, under the circumstances I ask the Court to non-suit the plaintiff's opening. This present action is an action under the Federal Employers Liability Act of 1908, and its amendments. It appears from the plaintiff's opening that the accident happened on October 6th, 1910, to the plaintiff, a minor sixteen years old. That suit was begun against the defendant company on July 11th, 1916, more than two years after the day that the accident occurred to the plaintiff. Admitting all these facts to be true, it is the contention of the defendant company that the act of Congress known as the Employers' Liability Act precludes any recovery not brought within the time spe-

cified by the act itself, to wit, two years from the date that the action accrued, and that there are no exceptions in the statute, but the statute itself is exclusive on the matter of both liability and limitation.

The Court. What you are making, I understand, is a motion for a non-suit?

Mr. Scott. Yes, sir, on the plaintiff's opening.

The Court. The motion is granted. Of course, I have in mind, gentlemen, that I have heard the argument first, and the motion afterward. You may have an exception.

Mr. Mulligan. I desire an exception.

Exception noted as ground of appeal.

New Jersey Court of Errors and Appeals.

RUSSELL A. GILLETTE, *Appellant,* *vs.* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, *Respondent.*	Action at Law. Appeal from Supreme Court.

BRIEF OF RESPONDENT.

Statement.

The appellant while working as an apprentice in respondent's Kingsland, N. J., shops was injured on October 6, 1910, while repairing a locomotive used in interstate commerce.

At the time of his injury he was sixteen years old and he became of age on July 21, 1915.

Nearly a year after he became of age, to wit, on July 11, 1916, he brought suit under the Federal Employer's Liability Act.

This respondent set up as its second defense the statute of limitations (p. 8, l. 7, et seq.; p. 9, l. 1, et seq.), and on the trial was allowed to amend its answer by separating its second defense of the statute of limitations by setting up specifically the limitation of the Federal Act (p. 12, l. 30, et seq.) and putting the case of the appellant in issue in another separate defense also setting up the limitation prescribed by the statute (p. 13, l. 3, et seq.).

The allowances of these amendments by the court

were not objected to by the appellant, but subsequently he moved to strike them out (p. 17, l. 7, et seq.); being denied, the cause proceeded and on the appellant's opening to the jury, it having appeared that the suit had been instituted by him against the respondent more than two years after the injury to him, the court on the respondent's motion directed a non-suit in view of the fact that Sec. 6 of the Federal Act read as follows:

> "That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued."

The precise points involved in this case are:

1. When did the action accrue to the appellant—a minor at the time of his injury?

2. Was the accrual of said action suspended until the appointment of a guardian or next of friend?

3. Can any exceptions in favor of infants be imported into the construction of the statute in question?

ARGUMENT.

POINT I.

It is the contention of the respondent that the appellant's right of action accrued to him at the time of his injury and that the Act under which he seeks to enforce a recovery having been made by competent legislative authority, not having made any exceptions in favor of infants, the appellant was properly non-suited because it was undisputed that the action was brought after the time prescribed by the statute.

In limine it may be well to consider briefly the Act in question to ascertain just what new actions it creates.

In the *American R. Co. vs. Didrickson,* 227 U. S., 145, 57 L. Ed., at p. 457, the Court said of the Act:

> "The cause of action which was created in behalf of the injured employee did not survive his death nor pass to his personal representatives. But the Act, in case of the death of such an employee from his injury, created a new and distinct right of action for the benefit of the dependent relatives named in the statute."

With respect to the right of action of the injured employee the Act itself creates no more liabilities upon behalf of the carrier than at common law, but it does create new rights in the employee in the abolishment of certain defenses theretofore had by the carrier and a good cause of action at common law which failed to show the carrier was engaged in interstate commerce is still sustainable at common law, unless superseded by Compensation Acts now so prevalent throughout the United States.

> *Wabash R. Co. vs. Hayes,* 234 U. S., 86-91; 58 L. Ed., at p. 1230.

It is therefore apparent that in the consideration of this case there is a marked difference as to when a cause of action accrued to a living injured employee under the first right of action created by the statute and the second right of action created by the statute *for the benefit of the dependent relatives,* but not vesting said right of action in them but in making the carrier

> "liable in damages * * * to his or her personal representative."

Which personal representative read in the light

of the relevant circumstances of the Act undoubtedly means administrator or administratrix.

Gutierrez vs. E. P. & N. E. R. R. Co., 117 S. W., 426-8;
A. R. Co. vs. Birch, 224 U. S., 547; 56 L. Ed., at p. 882.

The action on account of death being vested in the administrator, it is manifest the action under that particular section of the Act does not accrue until the coming into being of such personal representative.

This examination of the Act has been made necessary by reason of the reliance of the appellant on the case of *A. R. Co. of P. R. vs. Coronas,* 230 Fed., 545, which he considers dispositive of the case at bar.

An examination of this case (which was in another form the *Didrickson* case 227 U. S., 145, hereinbefore referred to) shows that it was an action for the death benefit of the mother and father of Didrickson, brought by Didrickson's administrator.

Didrickson was injured November 30, 1908; he died on December 8, 1908; letters of administration were granted to Coronas on May 12, 1914, nearly six years after the employee's injury and death, and that suit was started seven months (December 17, 1914) after the appointment of the administrator.

If as decided by that case the action did not accrue until the coming into being or appointment of the administrator, the suit was well brought within the time limited by the Federal Act.

The case at bar, however, presents an entirely different situation. The appellant or injured employee himself has brought suit under the first right of action created by the statute and seeks to take advantage of his minority to defeat the express wording of the statute.

The rationale of the *Coronas* case and all the pertinent decisions cited therein proceeds on the theory not that there was no one to bring the suit, *but no one in esse to lodge the right or cause of action in,* the cause of action being, as it were, suspended until the personal representative should come into being.

The case of *L. & N. R. Co. vs. Sanders,* 86 Ky., 259, cited by the court in the *Coronas* case at p. 521, is not analogous to the case at bar although certain rights of infants were involved.

Commenting on the case of *Butler vs. Penn. R. R. Co.,* 201 Fed., 553, the Court in the *Coronas* case used this significant language:

> "It is apparent from this decision that the District Judge entertained the view that the beneficiaries might maintain the action in their own names. If this is true, it would 'follow that the action would accrue' at the time of death, *as the beneficiaries were then in esse and could maintain the suit"* (p. 552).

The appellant contends that because "technically an infant cannot maintain a suit and in legal contemplation is ignorant of his rights" that therefore the action in question does not accrue to him until he reaches his majority, or a guardian or next of friend is appointed.

This proposition without statutory authority or statutory exemptions finds no support in law.

The section of the statute under which the appellant's suit was instituted provides that the carrier

> "shall be liable in damages to any person suffering injury."

That the appellant was a person *in esse* for the purpose of vesting this right of action in him is apparent.

> *Phillips vs. Herron,* 45 N. E., 720;
> *Hone vs. Van Schaick,* 3 Barb., Ch. N. Y., 488-9.

He would have had a standing in court even though no next of friend or guardian ad litem had been appointed, the appointment of the guardian being a matter of procedure rather than substance.

14 R. C. L., Sec. 50, pp. 280-1;
Lamb vs. Lamb, 23 Atl. Rep., 1009;
Fassitt vs. Seipp, 95 Atl., at 279;
St. L., etc., R. Co. vs. Haist, 71 Ark., 258, 72 S. W., 893;
Moore vs. Flagg, 137 App. Div., N. Y., at 346;
Secs. 17-18, Practice Act, P. L. 1903, p. 539;
Moore vs. Moore, 74 N. J. E., 733.

The action accrued to this appellant even though he was a minor, the rule being that an action accrues *from the time when the holder thereof has the right to apply to the court for relief and to commence proceedings to enforce his rights.*

1. Wood on Lim. (4th ed.), sec. 122 A.

It remains therefore for us to but consider whether where a statute which gives a new right of action without providing for any exception in favor of infants any exception will be read into said statute.

A case analogous to the case at bar decided by a former member of this court is found in 31 N. J. L. J. 81, *Pike vs. D. L. & W. R. R. Co.*

It then appeared that an infant was injured on August 18, 1901, that suit was instituted on June 20, 1907 and that the railroad company pleaded that under an act covering railroads, (Rev. of 1903 P. L. 1903, pp. 645-674).

> "All actions accruing from injuries to persons caused by the wrongful act, neglect or default of any railroad company owning or operating any railroad within this state, shall be commenced and sued within two years next after the action accrued and not after."

This statute contained no exception extending the period of limitation in favor of infants or lunatics.

The claim was then made that it is at the option of the infant either to sue by next friend during minority or wait until majority and then sue like any person sui juris.

The learned Judge determined that this railroad act and the limitation act, which latter act secured certain privileges to infants, were two independent schemes and that the railroad act must be construed by itself.

He thereupon held that

> "No personal rights were infringed nor any rule of natural right violated by the passage of an act that contains no exception in favor of a minor."

In *Vance vs. Vance,* 108 U. S. 514, the court held that

> "The exemptions from the statute of limitations usually accorded infants and married women do not rest upon any general doctrine of the law that they cannot be subjected to their action, but in every instance upon express language in those statutes giving them time after majority or after cessation of coverture, to assert their rights."

Justice Miller remarking as follows:

> "It is urged that because the plaintiff in error was a minor when this law went into operation it cannot affect her rights. But the Constitution of the United States, to

> which appeal is made in this case gives to minors no special rights beyond others and it was within the legislative competency of the State of Louisiana to make exceptions in their favor or not * * *" (p. 522).

In *Morgan vs. City of Des Moines,* 60 Fed. 208, it appeared that a statute was passed creating a right of action for injuries due to defective sidewalks maintained by municipalities.

The act was complete in itself creating a new class of actions, the legislature it was conceded had power to enact it.

It was provided that notice of injury should be given to the city within 90 days and that no suit should be brought after six months.

The party injured at the time of the accident was four years old (54 Fed. Rep. Act 460).

The plaintiff contended that the general statute of limitations of the state should be imported by construction into the statute under consideration giving the plaintiff one year after her disability to commence an action.

The court said:

> "It would be entirely competent for the legislature to enact a general statute of limitations putting minors and adults on the same footing as to all causes of action, *and such would be the legal effect of a statute which contained no saving clause exempting infants from its operation*" (p. 209).

The court referred to the fact that technically infants were incapable of suing but answered said argument by stating that that was a matter for the legislature and not the courts (p. 210).

In *Schauble vs. Schulz,* 137 Fed. Rep. 389, it was said that the fact two of the plaintiffs were minors did not help their cause of action because the statute on which it was founded contained

> "no exceptions and it so plainly indicates

> that in itself it fully speaks the legislative will that no exceptions can be read into it" (pp. 395-6).

Speaking as to the construction of similar statutes the United States Supreme Court said in *Bank vs. Dalton,* 9 How., at 529.

> "The legislature having made no exception, the courts of justice can make none, as this would be legislating."

Quoting *McIver vs. Ragan* 2 Wheaton 29, it said:

> "Whenever the situation of the party was such as in the opinion of the legislature to furnish a motive for exempting him from the operation of the law, the legislature has made the exception, and it would be going far for this court to add to those exceptions."

Similar authorities may be found in

Weber vs. St. P. C. Ry. Co., 97 Fed. at 143;

St. L. C. C. Co., vs. A. C. Co., 125 Fed. at 199;

Ayres vs. Cone, 138 Fed. at 786.

In *Demarest vs. Wynkoop,* 3 John Ch. (N.Y.) Chancellor Kent said:

> "The doctrine of any inherent equity creating an exception as to any disability, where the Statute of Limitations creates none, has been long been and I believe uniformly exploded. General words in the statute must receive general construction; and if there be no express exception the court can create none" (p. 142).

Even in those causes where a party seeks relief from a statute of limitations it has been said that

> "The statute of limitations contains various exceptions from the operation of its provis-

ions. Some of them relate to the character, condition or residence of the persons affected. Some relate to the nature of the cause of action.

"If such exceptions had not been expressly made, there is high authority for the proposition that a court of equity could not create them, however meritorious the case may be."

Freeholders vs. Veghte, 44 N. J. L. at 513.

In the same case our Supreme Court cited *McIver vs. Ragan,* 2 Wheat. 25, while Chief Justice Marshall said:

"If this difficulty be produced by the legislative power, the same power might provide a remedy, but the courts cannot, on that account, insert in the statute of limitations, an exception which the statute does not contain."

In *Amy vs. Watertown,* 130 U. S., 320, 32 L. E. 953, it was held that the general rule respecting statutes of limitations is that the language of the act must prevail

"and no reasons based on apparent inconvenience or hardship can justify a departure from it."

See also *Lewis vs. P. B. Wild West Co.,* 66 Atl. 471.

In *Peterson vs. Ferry Co.,* 190 Pa., 364 it appeared that the plaintiff at the time of the injury was a minor and was still a minor at the time suit was brought. Dealing with the question of a statute of limitations applicable to the case the court said:

"Its terms are general, and make no exception in favor of persons under disability. The settled rule is that infants as well as others are bound by the provisions of such statutes."

Even in those cases where a party seeks relief In *Boyle vs. Boyle,* 101 W. W. (Iowa), 748, the court said:

> "To hold that the fact of minority is a peculiar circumstance, such as contemplated, would be equivalent to ingrafting an exception on the statute, extending the time within which creditors who are minors may file claims during minority and thereby defeat the manifest intention of the legislature in enacting the the statute. * * * "

In *Bennet vs. G. R. & I. Ry. Co.,* 160 N. W., 424, to a suit under the Federal Act by an injured employee the carrier set up that the same was not commenced within two years from the time the action accrued to which the plaintiff replied that the carrier was estopped to set up such a defense because of certain fraudulent representations made to him by the defendant company.

The court in deciding in favor of the carrier held with the Court of Appeals of the District of Columbia in *Morrison vs. B. & O. R. R. Co.,* 40 App. Case, D. C., 391, where it was said respecting the Federal Act:

> "They create a right of action conditioned upon its enforcement within the prescribed period. The legislature, having the power to create the right may affix the conditions under which it will be enforced, and a compliance with those conditions are essential. The time within which the suit must be brought operates as a limitation of the liability itself as created and not of the remedy alone. It is a condition to the right to suit all. * * Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are therefore to be treated as limitations of the right."

In conclusion with respect to the hardship it is claimed the construction of the respondent would entail upon the appellant we respectfully call this court's attention to the remarks of Judge

Griffith quoted with approval as long ago as 1836, by Chief Justice Hornblower that

> "such now are the means and capacities which infants, feme coverts and insane persons possess to have their rights asserted * * that it may well be doubted whether much great injury does not flow from keeping up these savings, then would follow from the bare possibility, that now and then, a person might suffer from such incapacity."

POINT II.

The trial court committed no error in refusing to strike out the amended defenses or in granting the non-suit because it appeared that the suit was not begun until the time had elapsed after which, under section 6 of the Federal Employer's Liability Act "no action shall be maintained."

A. C. L. Ry. Co. vs. Burnett, 239 U. S., 199; 60 L. E., 75.

POINT III.

It is respectfully submitted that the trial court committed no errors and the judgment of the Supreme Court should be affirmed.

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