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WHEN DOES A CAUSE OF ACTION FOR WRONGFUL DEATH ACCRUE UNDER THE FEDERAL EMPLOYERS LIABILITY ACT?

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The Act of Congress of the United States, and its amendments, approved April 22, 1908, and commonly called the Federal Employers' Liability Act, provides that "No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued."[1]

The word *accrued* has caused the courts considerable difficulty. In relation to a personal injury not resulting in death, there has been no particular trouble; the cause of action accrues at the time of the injury and if no action is commenced within two years therefrom, it cannot be maintained afterwards.

When, however, there is an injury resulting in death, the determination of the date of the accrual of the cause of action is fraught with some difficulty. The crux of the difficulty is the obvious fact that a cause of action for wrongful death cannot accrue until the death. When the accident and the death are simultaneous, no problem arises; but often when the death occurs some time after the accident, the courts have been perplexed by the statute.

At one time it was held that the right of action for death accrues upon the appointment of an administrator. In *American R. Co. of Porto Rico v. Coronas*,[2] the injury occurred on November 30, 1908, and death resulted on December 8, 1908. Letters of administration were issued on May 12, 1914, and suit was filed on December 17, 1914. The court held the cause of action did not accrue so that the limitation attached

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1 United States Statutes at Large, Chap. 149, p. 65; also 45 USCA 56.

2 (Porto Rico, 1916), 230 F. 545.

until the administrator was appointed. The court followed the theory that the action could not accrue until there was in existence some one capable of suing.[3]

However, the holding of these cases has been definitely abandoned. In *Reading Co. v. Koons, Adm.*,[4] the employee was injured April 22, 1915, and the resulting death occurred on April 23, 1915. Letters of administration were granted to the plaintiff on September 23, 1921, and suit was commenced on February 6, 1922. The question never before directly answered by the Supreme Court of the United States was: Does the two-year statute of limitations begin to run from the date of the death or from the date of the appointment of an administrator? The opinion of the court is written by Justice Stone and is in part as follows:

"Every practical consideration which would lead to the imposition of any period of limitation would require that the period should begin to run from the definitely ascertained time of death rather than the uncertain time of the appointment of an administrator. Here the appointment was not made until six years after the death. No reason appears, if the opinion of the court below is followed, why the time might not have been extended indefinitely by the failure to apply for administration. The only persons who can procure the appointment of an administrator are, ordinarily, spouse, next of kin, or creditors of the decedent. Certainly the common carrier would have no standing to make the application. The very purpose of a period of limitation is that there may be, at some definitely ascertainable period, an end to litigation. If the persons who are the designated beneficiaries of the right of action created may choose their own time for applying for the appointment of an administrator and consequently for setting the statute running, the two-year period of limitation, so far as it applies to actions for wrongful death, might as well have been omitted from the statute."[5]

In regard to the meaning of *accrued* the court in this opinion states that the word refers to the time when all of the events have transpired which determine the liability of

[3] See also Guinther v. Philadelphia & R. R. Co. (CCANJ 1924), 1 F (2d) 85.

[4] (1926), 271 U. S. 58, 70 L. Ed. 835.

[5] See also Brooks v. Seaboard Air Line Ry. Co. (1921), 107 S. E. 878; (1922) 110 S. E. 328.

the carrier, and that when all of these events have happened, the cause of action has come into existence or has accrued.

However, *Reading Co. v. Koons*[6] does not clearly cover: (1) the situation in which the action is commenced within two years of a death occurring more than two years after the injury; (2) the situation in which the action is commenced within two years of a death occurring less than two years after the injury.

(1) The situation in which the action is commenced within two years of a death occurring more than two years after the injury is conclusively covered by *Rogers v. Pennsylvania R. Co.*[7] In this case the employee was injured November 10, 1922, and the resulting death was on February 4, 1925. Action was brought for injuries (actions for injuries survive under the Act, 45 USCA 59) as well as death by the administratrix on December 2, 1926. It was held that the statute of limitations had run; that as there was no cause of action of any kind in the employee at the time of his death, there could be none in the administratrix.[8]

An action for wrongful death, obviously, can not be commenced before the death; and if the death does not occur within the two years following the injury, an action for wrongful death can not arise. The right of the personal representative is predicated upon the existence of a right of action in the deceased immediately preceding his death. If the deceased himself could not have maintained an action brought at the time of his death, the personal representative can not. It is error to conclude that a cause of action for wrongful death always accrues at the date of the death. If the death occurs more than two years after the injury, the action for wrongful death does not accrue at all, for there can not properly be one, there being no cause of action in the deceased at the time of his death.

(2) One other situation should be discussed. If the em-

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[6] (1926), 271 U. S. 58, 70 L. Ed. 835.

[7] (N. Y., 1927), 19 F. (2d) 522.

[8] See also Flynn, Executor etc., v. New York, N. H. & H. R. Co., 283 U. S. 53-56; 75 L. Ed. 837 (1933, Conn.).

ployee lives for, say, one year, after the injury, and then dies, and his personal representative files suit within two years of the death, but more than two years after the injury, then what? In *Dusek v. Pennsylvania R. R. Co.*,[9] the deceased was injured on April 20th, 1928. His death resulted February 12th, 1929. A complaint for wrongful death was filed April 21st, 1930; the writ of summons was prepared and signed April 21, 1930, was received by the United States Marshal on July 8, 1930, and was served on the defendant July 10, 1930.

Here the death occurred within two years of the date of the injury and suit was not commenced until more than two years after the date of the injury. The question to be decided by the court was: When did the cause of action accrue? If it accrued at the date of the injury, the action would be barred by the statute. If it accrued at the date of the death, the action would lie.

The deceased had neither filed suit in his lifetime for his injuries, nor had he made any settlement whatsoever. The court court held that

". . . at his death, the right to bring action for the loss thereby occasioned, was unimpaired by anything which, while he had lived, he had done or failed to do. . . . Concluding as we do that under the facts here appearing, the cause of action for the wrongful death accrued on the date of the death, the suit was begun in ample time. . . ."[10]

It is thus clear that an injured employee penalizes his beneficiaries by living too long. If he lives for more than two years after the injury, and then dies as a result of the injury without having filed any action, his personal representative is barred by the statute of limitations from properly filing for either injuries or death. But if the injured employee dies within two years of the date of the injury, then the personal representative may file suit for wrongful death within two years of the date of the death, the date of the death being the date of the accrual of the cause of action in such a case.

[9] (Ind., 1933), 68 F. (2d) 131.

[10] See also Bell v. Wabash R. R. Co. (Mo., 1932), 58 F. (2d) 569.

Under the decision of *Dusek v. Pennsylvania R. R.*,[11] it appears that it would be possible for a suit for wrongful death to be properly filed within four years after the injury when the resulting death occurred within two years after the accident. Suppose an employee is injured January 1, 1932, and that his resulting death occurs on December 31, 1934, his personal representative may file suit for his wrongful death on December 31, 1936, nearly four years after the accident, and the Statute of Limitations would not be a bar.

Conclusions: (1) A cause of action for personal injuries either by the employee during his lifetime or by his personal representative after his death, commenced more than two years after the accident, is barred by the statute of limitations.

(2) A cause of action for wrongful death commenced more than two years after the death is barred.

(3) A cause of action for wrongful death commenced within two years of a death occurring more than two years after the injury, is barred by the statute.

(4) A cause of action for wrongful death commenced within two years of a death occurring within two years of the injury is not barred.

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[11] (Ind., 1933), 68 F. (2d) 131.