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New Jersey Supreme Court.

WILHELM GOGOLIN — and — LENA GOGOLIN, Plaintiffs, vs. ALFRED W. WILLIAMS, Defendant.	Action-at-Law. Notice of Appeal.

Filed January 18, 1917

To Messrs. Mackey & Mackay, Attorneys of the above named Defendant:—

TAKE NOTICE, that the plaintiffs appeal to the Court of Errors and Appeals of the State of New Jersey, from the whole of the judgment entered in this cause on January 6, 1917, on the following grounds:

1. The trial Judge directed judgment against the plaintiffs and in favor of the defendant, when there untomoved by counsel for the defendant, whereas, he should have denied the motion for non-suit and proceeded with the trial.

2. The Court below granted a non-suit upon the pleadings and without taking any discretion whatsoever, notwithstanding that an order had been previously made by one of the Justices of said Court denying a motion to strike out the complaint in said cause upon the same grounds as raised by

the attorney of the defendant on his motion for non-suit at the trial.

3. The motion to strike out the complaint, which was previously denied by a Justice of the Supreme Court was, under our practice in the nature of a demurrer, and having once been passed upon, the trial Judge in the same Court should have considered the matter as res adjudicata, and should not have entertained the motion for non-suit solely upon the pleadings.

4. The complaint set forth a cause of action against the defendant, and the Court should have proceeded with the trial.

5. Admitting the allegations in plaintiffs' bill of complaint, the statute of limitations could be no bar to the action therein set forth, and the trial Judge erred in ordering a non-suit on the theory that the statute of limitations barred the action.

6. The trial Judge erred in deciding that the statute of limitations began to run from the time defendant made the survey and map, and not from the time the resultant injuries, by reason of such careless and unskilfull and negligent survey, arose against the plaintiffs.

7. The judgment was in divers other respects erroneous and illegal.

LEONARD VAN LENTEN,
Attorney for Plaintiffs.

New Jersey Supreme Court.

WILLIAM (OR WILHELM) GOGOLIN — and — LENA GOGOLIN, vs. ALFRED WILLIAMS.	Action-at-Law. On Postea Mackay and Mackay, Attorneys. (Judgment for Defendant.)

Judgment entered this sixth day of January, A. D. nineteen hundred and seventeen, for the sum of thirty nine dollars and ten cents cost in favor of the defendant and against the plaintiff.

WM. E. GUMMERE, C. J.

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 judgment entered in above stated cause which said judgment is recorded in this office in Vol. 9 of judgments, page 550.

In testimony whereof I have hereunto set my hand and the seal of said Court at Trenton, this eleventh day of January, A. D., nineteen hundred and seventeen.

(L. S.) WM. C. GEBHARDT,
Clerk.

New Jersey Supreme Court.

BERGEN COUNTY

WILHELM GOGOLIN — and — LENA GOGOLIN, Plaintiffs, vs. ALFRED W. WILLIAMS, Defendant.	Action-at-Law. Complaint.

Filed March 16, 1916

Plaintiffs, Wilhelm Gogolin and Lena Gogolin, of the Township of Saddle River in the County of Bergen and State of New Jersey, say that:—

1. At the time herein stated, defendant was a Civil Engineer and Surveyor, practicing in the Town of Hackensack.

2. In the year 1907, plaintiffs, being the owners of a tract of land situated in the Township of Saddle River, in said County of Bergen, employed the defendant as an Engineer and Surveyor to survey said land for plaintiffs and for that purpose, defendant for reward, undertook as a surveyor and engineer, to perform that service for plaintiffs.

3. In that year, defendant, in pursuance of said agreement made a survey and map entitled, "Property of Wm. Gogolin, Rochelle Park, Bergen Co. N. J. Scale 50 ft. pr. inch Alfred W. Williams, Civil Engr. and Surveyor, Hackensack, N. J. 1907," and delivered same to plaintiffs, and represented the same to plaintiffs to be a correct survey and map of said lands.

4. In reliance on said representations of defendant, that said map and survey were an accurate and true map and survey of plaintiffs' said lands, plaintiffs, afterward, and while still believing said map and survey to be correct, did build or cause to be built, on a large tract of land, included therein, as the property of the plaintiffs but not in fact, the property of the plaintiffs, or either of them, two dwelling houses at a total cost to the plaintiffs of $4000.00.

5. In the year 1915, and long after said houses had been erected, as aforesaid, plaintiffs discovered that the defendant did not correctly survey the lands of plaintiffs but included in said survey and map as the property of plaintiffs, a large tract of land, not the property of said plaintiffs, or either of them, on which plaintiffs had built as aforesaid.

6. Defendant did not use due and proper care or skill in surveying the lands of the plaintiffs, nor in the return of said survey and map referred to in paragraph No. 3, but negligently included therein, as part thereof, said large tract, belonging to a person other than plaintiffs.

7. By reason or said negligence of defendant, plaintiffs were afterwards, towit, in the year 1915, compelled to purchase said large tract of land, not their property as aforesaid, at a cost of ($1500).

8. By reason of the premises, the plaintiffs were injured and obliged to, and did expend, the sum of ($1800), for moneys paid by the plaintiffs to the defendant for his services; moneys paid by the plaintiffs for search fees, attorney fees, and a new survey and map made by Robert P. Zoerner, C. E., and for moneys paid by the plaintiffs in purchasing said lands the defendant surveyed for plaintiffs and not owned by them.

Plaintiffs demand $1200.00 damages.

LEONARD VAN LENTEN,
Attorney for Plaintiffs.

New Jersey Supreme Court.

WILHELM GOGOLIN — and — LENA GOGOLIN, his wife, Plaintiffs, vs. ALFRED W. WILLIAMS, Defendant.	Action-at-Law. Notice to Strike out Complaint.

To Leonard Van Lenten, Attorney of Plaintiffs.

TAKE NOTICE that on the fourth day of April next at ten o'clock in the forenoon at the Court House in Hackensack before the Honorable Charles W. Parker, one of the Supreme Court Justices, we shall move to strike out the complaint in this case upon the ground that it discloses no cause of action, in that the cause of action have accrued more than six years ago, and the claim is, therefore barred by the statute of limitations.

2. Because the plaintiffs have no action at law against the defendant on the facts stated in the complaint.

MACKAY AND MACKAY,
Attorneys of Defendant.

New Jersey Supreme Court.

WILHELM GOGOLIN — and — LENA GOGOLIN, his wife, Compl'ts, vs. ALFRED W. WILLIAMS, Defendant.	Action-at-Law. On Motion to Strike out Complaint. Order.

Filed May 18, 1916

Application having been made, before me by Mackay and Mackay, Attorneys of the above named defendant, in the presence of Leonard Van Lenten, Attorney for the above named plaintiffs, on due notice, to strike out the complaint in the above entitled cause on the ground, (1) that it discloses no cause of action in that the cause of action accrued more than six years before the commencement of the suit and, (2) that the plaintiffs have no cause of action against the defendant on the fact stated in the complaint and argument for and against said application having been heard and duly considered;

It is, on this 16th day of May, 1916, ordered, that the said motion is hereby denied, but without costs;

It is further ordered, that the defendant have leave to file an answer to the said complaint within ten days of the service upon him, or his said Attorneys, of a copy of this order.

JAMES F. MINTURN,
Justice.

JUSTICE'S LETTER

JUSTICE JAMES F. MINTURN
Hoboken

Supreme Court of New Jersey
Chambers

May 9th, 1916.

JOHN J. SLATER, Esq.,
County Clerk:

Dear Sir:—

In the case of Gogolin v. Williams, will you kindly notify counsel (Messrs. Mackay and Mackay for Deft. and Mr. Van Lenten for Plaintiff) that I shall refuse the motion to strike out the complaint. I think the case should proceed to trial, and thereafter the defeated party may appeal and present the question in the light of the testimony to the Appellate Court. Costs will not be allowed.

Kindly send a copy of this letter to the attorneys of both parties.

Very truly yours,

JAMES F. MINTURN.

New Jersey Supreme Court.

BERGEN COUNTY

WILHELM GOGOLIN — and — LENA GOGOLIN, Plaintiffs, vs. ALFRED W. WILLIAMS, Defendant.	Leonard Van Lenten, Attorney of Plaintiffs. Mackay and Mackay, Attorneys of Defendant.

Filed May 23, 1916

(Summons issued March 13, 1916.)

Plaintiffs, Wilhelm Gogolin and Lena Gogolin, of the Township of Saddle River, in the County of Bergen and State of New Jersey, say that:—

1. At the time hereinafter stated, defendant was a Civil Engineer and Surveyor, practicing in the Town of Hackensack, in said County of Bergen.

2. In the year 1907, plaintiffs, being the owners of a tract of land situate in the Township of Saddle River, in said County of Bergen, employed the defendant as an Engineer and Surveyor to survey said land for plaintiffs; and for that purpose, defendant, for reward, undertook as a surveyor and engineer, to perform that service for the plaintiffs.

3. In that year, defendant, in pursuance of said agreement made a survey and map entitled "Property of Wm. Gogolin, Rochelle Park, Bergen Co., N. J. Scale 50 ft. pr. inch Alfred W. Williams, Civil Engr. & Surveyor, Hackensack, N. J. 1907," and delivered same to plaintiffs, and represented the same to plaintiffs to be a correct survey and map of their said lands.

4. In reliance on said representations of de-

fendant that said map and survey were an accurate and true map and survey of plaintiffs' said lands, plaintiffs afterward, in the year 1910, and while still believing said map and survey to be correct, did build or cause to be built on a large tract of land, included therein as the property of the plaintiffs, but not in fact, the property of the plaintiffs, or either of them a dwelling house at a total cost to the plaintiffs of $4000.00

5. In the year 1915, and long after said house had been erected, as aforesaid, plaintiffs discovered that the defendant did not correctly survey the lands of plaintiffs but included in said survey and map as the property of the plaintiffs, a large tract of land, not the property of said plaintiffs, or either of them, on which plaintiffs had built as aforesaid.

6. Defendant did not use due and proper care or skill in surveying the lands of the plaintiffs, nor in the return of said survey and map referred to in paragraph No. 3, but negligently included therein, as part thereof, said large tract, belonging to a person other than plaintiffs.

7. By reason of said negligence of defendant, plaintiffs, were afterwards, to wit, in the year 1915, compelled to purchase said large tract of land, not their property as aforesaid, at a cost of ($1200.)

8. By reason of the premises, the plaintiffs were injured and obliged to, and did expend the sum of ($1200) for moneys paid by the plaintiffs to the defendant for his services, moneys paid by the plaintiffs for search fees, attorney fees, and a new survey and map made by Robert P. Zoerner, C. E., and for moneys paid by the plaintiffs in purchasing said lands the defendant surveyed for plaintiffs and not owned by them.

Plaintiffs demand $1200.00 damages.

LEONARD VAN LENTEN,
Attorney for Plaintiffs.

ANSWER

Answer Filed May 27, 1916

The defendant of the Township of New Barbadoes, in the County of Bergen and State of New Jersey, by way of answer says:—

1. He admits paragraph one of the complaint.

2. He denies paragraph two of the complaint in so far as it recites that the defendant was employed by the plaintiffs but says that the defendant was employed by one of the plaintiffs, to wit: William Gogolin.

3. This defendant admits that he made a map entitled, "Property of Wm. Gogolin, Rochelle Park, Bergen Co., N. J.," but denies that he represented the same to be a correct survey and map of the lands of the plaintiff.

4. Defendant has no knowledge or information as to the matters and things set forth in paragraph four of the complaint, and leaves the plaintiffs to their proof.

5. Defendant has no knowledge or information sufficient to form a belief as to the matters contained in paragraph five of the complaint, and leaves the plaintiffs to their proof.

6. Defendant denies paragraph six of the complaint.

7. Defendant denies that part of paragraph seven of the complaint that charges the defendant with negligence; as to the other matters set out therein defendant has no knowledge or information sufficient to form a belief, and leaves the plaintiffs to their proof.

8. Defendant has no knowledge or information sufficient—form a belief as to paragraph eight of the complaint, and leaves the plaintiffs to their proof.

First Defense.

Defendant will contend at the trial of the issues

herein that the complaint discloses no cause of action against this defendant.

2. That the cause of action, if any existed against the defendant, is barred by the statute of limitations.

3. Defendant made a map as aforesaid in accordance with instructions received by him from Wilhelm Gogolin, one of the plaintiffs.

MACKAY AND MACKAY,
Attorneys of defendant.

Filed May 27, 1916

The plaintiffs deny every allegation of "First Defense" of the answer.

LEONARD VAN LENTEN,
Attorney for Plaintiffs.

Bergen County Supreme Court.

WILHELM GOGOLIN,
Et Ux,
Plaintiffs.

vs.

ALFRED W. WILLIAMS
Defendant.

Transcript of shorthand notes of proceedings taken in the above entitled cause, at the Court House in Hackensack, N. J., on December 14th and 15th, 1916.

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

For the Plaintiff, LEONARD VAN LENTEN and W. V. ROSENKRANS.

For the Defendant, MACKAY and MACKAY.

(A jury was called and sworn.)

THE COURT: What is your contention, Mr. Mackay, as to your first defence, or second defence?

MR. MACKAY: The statute of limitation.

THE COURT: That is your second defense. The first defense is bound up in that undoubtedly, of course. The second defense is that the cause of action is barred by the statute of limitation.

ARGUMENT

MR. MACKAY: I might say, this is a Supreme Court issue, and we served the plaintiff with notice of a motion to strike out the complaint, because there was no cause of action, and of course the complaint has since been amended; trying to bring the case within the statute.

Our contention is that——the Judge denied the motion; he thought the case had better go to trial before the Court and have it thrashed out there ——the contention is that if a mistake was made ——assuming for the purpose of the argument that a mistake was made——if a mistake was made, it was made at the time that the survey was completed. In other words, when Williams completed his survey, if he made a mistake in surveying, it was made at that time when he handed over the maps to the plaintiffs in 1906, showing a certain piece of ground surveyed; if it did not show the proper piece of ground surveyed, or did not show the properties correctly, the mistake was then made. We say that from that time that the statute of limitation began to run, and that the plaintiff should bring his action within six years after the completion of the survey. The defendant of course contends that the statute began to run from the time of the discovery of the mistake, and we say of course that is not the law.

I was relying on a New York case; I did not find any New Jersey case exactly in point.

THE COURT: Your insistment is that the statute of limitation, which is for a period of six years, runs from the time of the delivery of the survey to the party for whom it was made; that is your contention, is it?

MR. MACKAY: Yes sir.

THE COURT: What says the plaintiff?

MR. ROSENKRANS: This matter has been argued before Justice Minturn, upon a motion to strike out the complaint, pleading at that time the

statute, and the point raised then was this—— because we based our argument on this ground—— this case is in the nature of a trespass. We don't charge any fraud. We just say that there is negligence, and there are a series of cases where the statute began run, not from the time of the orginal negligence——in other words, for the sake of the argument, after the survey was made in November, 1907, if we had done nothing, had built nothing, we would have no cause of action to-day, because the damages right away would have been technical damages, likely six cents; but in 1912, relying upon this survey, in August, 1910, we built a house costing approximately $2300. or $2500. We say that an action arises there on account of consequential damages.

THE COURT: What are these series of cases? What do they hold or attempt to hold as to the running of the statute?

MR. ROSENKRANS: The first one, consequential damage, occurs——

THE COURT: Is it from when it occurs or from when the parties suing, by the exercise of reasonable care, did discover or would have discovered the error?

MR. ROSENKRANS: No, when the consequential damages came into existence. For instance here is a case the most important case I can find, Church of the Holy Communion against Paterson, 37 Vroom, page 218, March Term, 1901. In that case, in '88, a railroad was built near the line of the church property, and in constructing it the Company made a deep excavation near the line of the church whereby the foundation of the wall was damaged. In 1882, as a result of negotiations for settlement of which damage, the railroad company, among others, built with the acquiescence of the church, a wall with a view of preventing any further subsidence and damage. In 1887 the vibration

caused by the passing trains resulted in the settling of that wall; that is, consequential damages resulted at that time, and in the further subsidence of the church building. An action was brought to recover for the damages in 1891, and they held on the theory that consequential damages——that the statute should only begin to run from 1887.

THE COURT: That was for a subsequent action in that case?

MR. ROSENKRANS: No, in 1887 that wall began to crumble, and they say you only started your action in 1891, you kept within the six year limit.

THE COURT: What other cases than that have you?

MR. ROSENKRANS: That is the main case I have relied upon. Then there is a case——

THE COURT: You say you must wait until consequential damages have accrued? Suppose in the interim between the time when the survey was delivered and the time that you built the house, consequential damages did accrue, the plaintiff had knowledge of this defect, then what?

MR. ROSENKRANS: Then that would create an entirely different——

THE COURT: Is there any degree of care required on the part of whom such service is performed to ascertain—

MR. ROSENKRANS: I don't think so. He is a professional man, a surveyor and civil engineer. A person comes to him and gives him this title deed; says, I bought this property; I want a survey made; and told him at the time what he wanted it made for; expected to develop it and sell part of it. He relied upon that survey and upon that map, because he had a perfect right to do so.

THE COURT: I wanted to know what your contention was upon this one question, gentlemen.

MR. ROSENKRANS: Backhouse vs. Bonomi

Also find it in 16 English Ruling case law, page 216.

THE COURT: Have you that report here?

MR. VAN LENTEN: I can have it here.

MR. ROSENKRANS: I would like to say one thing in regard to the cases which he cited at that time, were cases in which there wasn't any consequential damages. In other words, all damages arose at the same time. There are a number of cases where professional people have made a search and have left out judgments or mortgages against the property. Of course there the point was that there wasn't any consequential damages; that just from the time the search was made, and the time the certificate was signed, the damage was done; because the judgment was a lien and the mortgage was a lien; and I have not been able to find any case contrary to this New Jersey case except where there were not consequential damages.

THE COURT: All right, call your first witness.

MR. MACKAY: Would your Honor like to hear my case?

THE COURT: What case have you, Mr. Mackay?

MR. MACKAY: I have a case directly in point; Troup against Smith, executors; a case brought against the executors of a surveyor, where the suit was brought six years after the survey was made. The answer was filed, setting up the statute of limitation; the replication to the answer alleged fraud, set up fraud in avoidance of the statute, and the Court held in a demurrer to the replication that the cause of action accrued at the time of the making, the time of the completing of the survey. I would just like to read it, if your Honor will bear with me.

(Referring) Justice Van Syckel said, "It was urged on the argument of plaintiff's case that mitigation might be considered as accruing when he discovered the fraud in making the survey by the

testator, or that the Court might say that this case and others similarly were not within the spirit and intent of the statute." I may say at this time that this statute in New York State is exactly the same as the statute in our State.

THE COURT: The statute of limitation?

MR. MACKAY: Yes, word for word. "It will readily occur to the profession that Courts of Law have in many instances introduced great refinement in the construction of statutes and that in some instances judges of great celebrity have displayed.

understanding and natural meaning to the words of the statute. With respect to the statute now under consideration cannot be regarded as the truth." So that the only authorities and the only decisions which were not followed and did not go to the logical conclusion are two Equity cases, and neither of them were ever followed to the logical conclusion; and the courts of law have always held, and continuously held, and this Justice concludes by saying that the statute of limitation commenced to run because this land was open; it was in the possession of the plaintiff. He had his deed. He had his map made. It was delivered to him. He was in a position to know; he should have been in a position to know. The courts will not go beyond that and will not change that later statute of limitation except where there is an infant, or, insanity, or some such well-known and established rule of law legally to take it out of the statute.

MR. ROSENKRANS: May I offer a suggestion on that case, that case just read by Mr. Mackay. Now, there are two very strong decisions between a New Jersey case and another case which I read, which strikes this case very squarely, and the case just cited. In the first place, we bring this action, not on the theory of fraud; this New York State case

is one where there is fraudulent concealment. The whole opinion just teems with the word fraud. The question here is whether the statute began at the time of the fraud concealment or from the time when it was established that there was fraudulent concealment.

THE COURT: Starting from the time of the consummation of the fraud, that case holds.

MR. ROSENKRANS: Yes, but our case is entirely different. We don't say that there was any fraud here. There was no fraudulent concealment here. In that case I think that the surveyor knew about the mistake, and did not disclose it afterwards. And in the second place, we don't claim that we have got a cause of action now within the six years on account of our discovery of the surveyor's mistake. We don't say that. We say that we have got a claim which isn't outlawed, isn't barred by the statute of limitation on account of our consequential damages arising from the fact that in good faith, in the year 1910, in July or August of 1910, within six years before bringing this suit, relying upon the surveyor, we built a building there costing $2000. to $2500., and as a consequence of this, we have this consequential damage. I say the two cases are not parallel.

THE COURT: The whole thing, in my mind, is this: Very true, you do not complain of any fraud on the part of the defendant. You simply claim that he transgressed the rule of care which is applicable to a person of his profession under such an engagement.

MR. ROSENKRANS: That is it.

THE COURT: And it is an action of trespass.

MR. ROSENKRANS: That is it.

THE COURT: And the statute of limitation says that the period within which such an action may be brought upon such a ground is six years, and that those six years began at the time of that negligent

act; then is your foundation good for nothing?

MR. ROSENKRANS: I don't think so; it seems to be six years from the time of consequential damages.

THE COURT: I am not just so sure that the Paterson case you speak of——I know of it roughly ——I am not just so sure that this is on all fours with this case at all; whether the action had for its base the injury accruing at the later period.

MR. ROSENKRANS: The point now is that the injur——

THE COURT: Yes, but another cause of action.

MR. ROSENKRANS: We are suing for another cause of action; we are suing for the action arising out of the consequential damages.

THE COURT: Yes, but he was not a party immediately to that consequential damages, was he? In the railroad case that you speak of——I am not perfectly familiar with this; I haven't read it carefully——there appears to have been some negligent act upon the part of the railroad company; this sinking, which was a cut and is near to the church, and the old church stands there yet.

MR. ROSENKRANS: That ir right.

THE COURT: Right on this bank.

MR. ROSENKRANS: That is it.

THE COURT: The initial wrong was in digging the width of that cut so close to the property of the church, this church edifice, that it caused the edifice to sink?

MR. ROSENKRANS: That is it.

THE COURT: That was the initial wrong which they attempted to rectify by building of a wall; and then after that, by operation of its trains, through that cut, that wall commenced to disintegrate, or something, or some element of damage came to the church building?

MR. ROSENKRANS: Yes, because the wall was not properly built.

ARGUMENT

THE COURT: The question here is whether there wasn't a case of negligence there which gave them practically a new right of action not based upon the original act of digging the cut, or the negligent manner in which they constructed their retaining wall which was of course in satisfaction of that original negligence.

MR. ROSENKRANS: Yes.

THE COURT: It may have been the manner in which they build that wall.

MR. ROSENKRANS: That is just the point; if the wall had been properly built——

THE COURT: When was that wall built with respect to the time this suit was brought?

MR. ROSENKRANS: In 1882.

THE COURT: The suit was brought——

MR. ROSENKRANS: In 1891. They tried to show by that the six years were up in 1886. They said no, that date was from the time of the consequential damages.

THE COURT: I am not going to pass upon this question without some more careful consideration.

MR. ROSENKRANS: I would like to submit the brief that I submitted to Justice Minturn.

THE COURT: Save me the trouble, so that in case I may not have access to them, I can get those from this.

MR. ROSENKRANS: Yes.

MR. MACKAY: Would your Honor care to take this book, read this case?

THE COURT: You might leave it in Chambers, Mr. Mackay, I will read it the first thing in the morning.

We will take our recess at this time until 10 o'clock to-morrow morning.

Hackensack, N. J.
December 15, 1916, 10 A. M.

MR. ROSENKRANS: Since the adjournment last night, Mr. Van Lenten has looked over his

papers and correspondence, letters from Justice Minturn, (Handing Court papers;) that might throw some light on the reason for the action taken by him.

THE COURT: (Referring) Well, of course, that would be very well indeed, if there were any evidence involved which would have to be settled and passed upon in order to pass upon the question that is before me, but I don't see that there is any question of fact at all that may be settled in order to pass upon this present motion. What was the shape of the complaint at the time of this finding? Was the complaint amended or were you on the original complaint at the time?

MR. ROSENKRANS: On the original complaint; it was the original complaint which was practically the same as this.

THE COURT: Of course, I don't know the mind of Justice Minturn. His mind may have been the same as my own, several times where motions have been made, addressed to a complaint. I will not strike out the complaint at this time. I will let it go to trial and deal with it. I don't find Justice Minturn's order denying this motion, any reason given for denying it, but I do find that he denies it without costs, and this letter doen't throw any particular light upon it, because it would appear to me as if he had in mind that there might be some fact which must be established and passed upon before the motion could be fairly and properly dealt with. As I view the case now, I don't see that there is any facts you need establish in order to pass upon this question, because as I understood it last night, all of the facts——you have stated so in your complaint——all of the facts upon which you can rely and all of the facts which you expect to prove, and this motion stands in the position of a demurrer, assuming, for the purpose of the motion, the truth of the allegation of facts in your

complaint; so I cannot see that there is any question of fact to be passed upon. Have you gentlemen found any further authority than what has been already said upon this matter?

MR. ROSENKRANS: I would like to say in regard to that question, if your Honor has read through carefully that railroad case, the Paterson case——

THE COURT: I have read it carefully, yes sir.

MR. ROSENKRANS: It is collated in a great number of English cases.

THE COURT: Yes, but, Mr. Rosenkrans, the difficulty with that case is this, that there is, as I seem to have suggested to you yesterday, without having carefully or having exactly in mind the case——I knew of the case, of course; there is a different situation in that case of the Church of the Holy Communion against the Paterson Extension Railway, or a different condition, in that there was no contractual relation existing between the plaintiff in that action and the defendant in that action, and the theory upon which the Court of Errors said that the action had or being had against the defendant, might be maintained, although a period of more than six years had gone by from the time that the retaining will was built by the defendant company, and the beginning of the action was that it proceeded upon the theory that the defendant company had been negligent in the construction of the wall, and that that negligence was a continuing negligence. This is what the Court practically finds: Each and every time a damage has accrued because of that continuing negligence, a right of action arose in the church, and that damage, the time of the damage, had marked the time of the new action each time, or new cause of action was marked by the time that the actual damage accrued, and gave them a new and series of actions as many times and as often and when each

time the damage accrued, and it did not grow out of any contractual relation existing as between the plaintiff in that action and the defendant. So also, and likewise these cases cited in that case and there is also cited the case against the Morris & Essex Canal, is there not, in that case?

MR. ROSENKRANS: Yes.

THE COURT: Of the Church of the Holy Communion against Paterson Railway, and so forth. In that case, if I have it correctly, there was this situation, that the canal company built a culvert, the building of which in itself was not negligence necessarily, but the result of that, in itself, in having been pleaded that it was not correctly of properly or sufficiently built, caused a damage to the lands of the plaintiff, and the Court held there that the damage first accrued to the adjacent lands during the time of ownership by the person who was the owner at the time that the culvert was built, and then subsequently, a number of years subsequent to that, damage accrued to the same land after they had passed out of the original owner's possession and the ownership of another. The Court held in that case that there was a continuing act of negligence chargeable to the Canal Company, and therefore the landowner, or the several landowners, had their rights of action as often and as many times and at such time as the damage actually accrued, because it was a continuing negligence. That was the theory upon which all of the cases were decided.

Now, this action of yours is based upon this, that there was a contractual relation between the defendant in this action and the plaintiff in this action, and that he negligently performed his contract.

Now, I don't know——I have given this considerable thought and given the best research I could since yesterday afternoon——

ARGUMENT

MR. ROSENKRANS: I would like to say one thing in regard to the contractual relation. The way I understand this case of the Church of the Communion against the Railroad Company, in the first instance, a railroad company went in there and cut this culvert through there in 1881, about.

THE COURT: For which particular injury a settlement took place.

MR. ROSENKRANS: At that time. Then there was an action commenced for damages, and they got together, and I think that there was a contractual relation at that time. The railroad agreed to build a wall there, with the consent of the church.

THE COURT: There was this about that: There was an offer, originally from the church to Mr. Hobart, representing the Railroad Company, that the church would settle not only the present existing damages that it claimed, but future damages ,for a given sum of money——I don't know what it was, $2300 or 3200.——

MR. MACKAY: $3500.

THE COURT: Some sum, however, which the railroad Company refused, and then an arrangement was made whereby the Railroad Company would do certain things by way of making good or remedying the harm which it had done, and the Railroad Company was to proceed thence to do that and the church was to do certain other reparations in the interior——windows and things of that character——which the railroad company agreed to pay for. That was done. Then later on, another damage accrued, for which, I think, $100 was paid by the railroad company, is that correct?

MR. MACKAY: That is correct.

THE COURT: And then still later on, this other damage accurred, which was the subject of this particular suit, in which the opinion was written. Now, the Court does speak of some promise on the

part of the railroad company or some settlement on the part of the railroad company that it would take care of the matter in the future. The Court passed upon that as a matter of contract between the railroad company and the church, the vestry of the church, but using it only in determining the force and effect to be given to a certain receipt which was given at that time, and as the railroad company claimed, that receipt was not one for past injuries but for future injuries.

Here is the point, Mr. Rosenkrans, that I want you to get to. You said something yesterday about there being a marked difference or entirely different situation from the conditions existing in this case, where we are now talking to, and as to a suit against an attorney or solicitor or against an abstracter because of an improper or incorrect abstract of title, and matters of that sort, I have to say that I don't find anything in any case or in any authority at all where that distinction exists, but I do find everywhere, every authority holding practically to the same point in all of those cases, and I am free to say that I find no case directed to a civil engineer and surveyor, except the one to which Mr. Mackay has called our attention. But there are innumerable cases against physicians and surgeons, against abstracters, makers of abstracts of title and against solicitors and attorneys, and the rule as to all of them seems to be the same.

Now, I am perfectly willing to give you the benefit of what I have been able to find, and it is this:

I will say first as to the case cited by Mr. Mackay, of Troup vs. Smith's executors, 64 Common Law Report, 31. That is the only case that has come to my attention, where the suit was against a surveyor in an action of this character, and there of course the question of fraud is spoken of by the court, and you say, of course, in this case there is not that ingredient of your right of action. I do

not think, if this case which I am now speaking to, is to be followed or given any force and effect, the mere fact that there was fraud, I do not think helps the situation as far as you are concerned, because, if anything, there would be this exception, that if there were in the case at bar, fraud, and the incorrectness of the survey was kept and had been kept from the attention of the plaintiff by fraud and concealment upon the part of this defendant, until the period or six years from the time of the completion of his contract, which was the delivery of the survey to the plaintiff, then undoubtedly, I think the rule would be in this State that the statute would not start to run against your plaintiffs until that concealment of fraud had been lifted and your plaintiff had knowledge of the incorrectness of the survey. Of course it would stand in your favor if there were fraud and concealment, but you say you don't charge, nor does your complaint charge, fraud or concealment. Therefore that is out of the question. These are the facts I found:

30 Cyc., 1582, and under the title, "Physicians and Surgeons," under the heading," Time to sue and limitation. The particular statute of limitation applicable in actions for malpractice depends upon whether the action is in contract or in tort. As the gist of an action to recover damages for unskilful treatment is the negligence of the surgeon, the statute begins to run from the time of the alleged negligence."

And I have one case which will shortly come to as a reference, and which I will more particularly refer to later, Mr. Rosenkrans, where I was cited or directed, under that text, to the note No. 23 or No. 67 in 25 Cyc. 1116, which also I will later come to. But in Gillette v. Tucker, 67 Ohio, 106, reported in 65 North-eastern Report, 865, "Holding that since want of skill or negligence on the part

of a physician gives rise to no cause of action unless injurious consequences follow, a cause of action accrues when the injury occurs."

That would seem to cover it, but I have in mind, and I have looked at that case this morning; the situation there, however, was a different one. It was that the physician had contracted to perform an operation and to care for the patient afterward. He performed the operation, and he did continue to care for the patient afterward. It was not known that she had some difficulty; appendicitis was what he operated for; it turned out during the operation that her appendix was not affected, but she had another difficulty, which he immediately proceeded to operate for. It seemed that she did not recover from the operation, and her condition continued for a number of months, during all of which time the physician continued to serve her. Finally, he, by his own act, severed his contractual relation with relation to his patient, said, "I will have nothing more to do with you." She thereupon went to another surgeon, who, upon an operation, found that the first surgeon, in performing his operation, had left in her abdomen a gauze sponge, which was the cause of her difficulty. She then began suit against the first surgeon. I think the rule in the State of Ohio as to the statute of limitation, in a case of that character, was one year from the accrual of the action. The action brought by her was started more than a year after the date of the operation, and the trial court directed a verdict for the defendant. The Circuit Court of Appeals in Ohio reversed it and in the final Court of Appeals the opinion sustains the finding of the Circuit Court of Appeals, and particularly upon this point:

Holding, first, that the action grew out of the contractual relation existing between the patient and her surgeon; finding that the trial court erred in having found or concluded that the contractual

relation in that particular case ceased at the time of the performance of the operation, and the Court of Appeals said if that were true, if it were the fact, then of course the trial court was correct. If the contractual relation had ceased at the date or upon the date of the performance of the operation, then the statute started to run from that time, and then more than a year would have elapsed from that time to the time when the suit was brought. But the Court of Appeals says, "Undoubtedly the contractual relation had not ceased at the time of the operation, because the surgeon's contract was, if not express, it was implied, and from his act he continued to serve that patient or prescribe for her and administer to her for a long period thereafter, and up until the time when he actually severed his contractual relation with her. Therefore the Court of Appeals says she, under the statute of limitation in Ohio, could have brought her action at any time, within any period, within any time, within one year from the time the contractual relation ceased." On that finding they say that the suit was brought within eight months of the time of the ceasing of contractual relation.

So you see, after all, from what I have read here as the note, it does not convey the true idea of that case, and I have read it very carefully this morning, and that case, of course, is not adverse at all to the thought I have been trying to express so far this morning.

Under the title of "Limitations of Actions" in 25 Cyc. 1116, I find that the general rule is, "In cases of negligent performance of contract or neglect of some duty imposed by contract, the cause of action accrues and the statute begins to run from the time of the breach or neglect, not from the time when consequential damages result or become ascertained; where the cause of action is founded on the breach of duty, and not on the conse-

quential damage, and the subsequent accrual or ascertainment of such damage, gives no new cause of action. In such cases the form of the action, whether case or assumpsit, is immaterial. The principle is well illustrated in cases involving breaches of professional duty by attorneys. A line of demarcation exists, however, between actions based upon the violation of some contractual right or duty and those based on the invasion of some other legal right or brought to recover consequential damages resulting from defendant's negligence or wrong-doing independent of any contractual relation."

There is a very marked distinction there.

"In the latter class of cases the right of action accrues and the statute begins to run either when plaintiff's legal rights have been violated or when actual damage results from defendant's acts, according to whether the act of defendant is or is not actionable per se." And for authority of that text , cases in innumerable jurisdictions are cited. None from New Jersey, however, and then continues:

"Malpractice by physicians has been held to fall within the rule of this text. Coady v. Reins, 1 Mont. 424; Fronce v. Nichols, 22 Ohio, Cir. Ct. Rep. 539. But where a surgeon performs an operation negligently and thereafter is continuously negligent in his care and treatment of the patient, there may be a recovery of damages for the negligent treatment, although a cause of action based on a negligent operation is barred by the statute. Tucker v. Gillette, 22 Ohio Cir. Ct. Rep. 664, where a surgeon in performing an operation left in the person's body a sponge which remained there, causing the patient injury, until the employment of another physician who removed it." This I have already considered.

Here is another instance:

ARGUMENT

"It has been held that a right of action for a breach of contract in failing to report a mortgage accrues of defendant's failure to perform that duty, and that the statute then begins to run, not when ultimate damage results;" referring to an attorney at law who did not record a mortgage when he should have under his contract of hiring with his clients, "not when ulitmate damage results (the recording of a second mortgage), or when defendant's default is discovered or when demand is made. The cause of action accrues immediately upon the breach of the contract by not performing the duty under the contract when it should have been performed, not when actual damages arises, or not when it becomes known to the parties suffering by it."

This is note 67 in Cyc.

Then again in 25 Cyc. 1135, under the same title that I have already stated, on this "Limitation of Actions," under section 18, under the heading, subheading of "In actions of Tort——general rule," is this: "The test to determine when the statute of limitation begins to run against an action sounding in tort is whether the act causing the damage does or does not of itself constitute legal injury, that is, an injury giving rise to a cause of action because it is an invasion of some right of plaintiff. If the act is of itself not unlawful in this sense, and plaintiff sues to recover damages subsequently accruing from and consequent upon the act, the cause action accrues and the statute begins to run when and only when the damages are sustained; and this is true, although at the time the act is done it is apparent that injury will inevitably result."

In substantiation of that text it cites a long line of decision; in the case of the Church of Holy Communion v. Paterson Extension Railway Company, 66 N. J. L., 218, and also the case I have re-

ferred to, the Delaware Canal Company against Wright, 21 N. J. L., 469.

"But if the act of which the injury is the natural sequence is of itself a legal injury to plaintiff, a completed wrong, the cause of action accrues, and the statute begins to run from the time the act is committed, be the actual damage however slight, and the statute will operate to bar a recovery not only for the present damages but for damages developing subsequently and not ascertainable at the time of the wrong done; for in such a case the subsequent increase of the damages resulting gives no new cause of action. Nor does plaintiff's ignorance of the tort or injury, at least if there is no fraudulent concealment by defendant, postpone the running of the statute until the tort or injury is discovered."

Again, in the same volume and of the same title, which is sub-title, "Attorney's neglect or breach of duty. Where an attorney at law is guilty of negligence or breach of duty in performing services for his client, the client's cause of action accrues and the statute begins to run at the time when the negligence or breach of duty occurs, not at the time when it is discovered or act of damage results or is fully ascertained."

There again citing a long line of cases, none, however, in the State of New Jersey. "And it is immaterial whether the remedy invoked is assumptive or a special action on the case, for the gist of the action is the attorney's breach of contract to use diligence and skill, and the subsequent damages give no new cause of action."

From all of which I gather, and I do not gather anything else than that if he was negligent, his negligence was complete, his breach of his contract was complete when he completed his contract with his contractors. That is what you will see later in cases of abstraction, and so forth. It is when

the abstract was delivered, or when the report upon which the plaintiff acted was made by the abstracter to him.

Under the same title, still at page 1117, under title "Contracts to make abstracts of title. The right of action against an attorney ar title examiner for making a false or incorrect report or abstract of title accrues when the examination of the title is reported or the abstract delivered, and the statute of limitation begins to run, not when the error is discovered or consequential damage results."

Again in 1 Cyc. 217, under the title "Abstracts of tiile" under the sub-division A, title, "Nature of action." The action against an abstracter is based on contract and not on tort." And the subdivision, "B. Accrual of right of action. The right of action against an abstractor for damages resulting from an incorrect abstract accrues at the time the examination is made and reported, and not when the error is discovered, or damages result therefrom."

Under the same title, in volume 1, Am. and Eng. Enc. Law page 221, Note 5. The statute of limitation begins to run from the time the abstract is furnished, not from the time when the damage occurred. The Russell v. Abstract Company, 87 Iowa, 233; Latin v. Gillette, 95 Cal. 317; Rankin v. A. Schaeffer, 4 Mo. Appeals, 108.

22 American and English Enc. 807, title "Physicians and Surgeons, under the sub-title "Limitation of Action. The right of action accrues and the statute begins to run at the time the injury is received, not from the time the damage is developed."

In 3 Am. and Eng. Enc. Law, 399, title, "Attorney and Client," there is this, under the sub-title of "Statute of Limitation. Actions against attorneys for negligence or want of skill are embraced in the general statutes limiting the time within actions on contract or breach of contract are to be brought, the action in such case is, except in special

instances, for a breach of the attorney's duty to use reasonable care, skill and diligence."

Under the sub-title, "When the statute begins to run——the statute begins to run from the time the cause of action accrued and not from the time of the damage suffered or from the time when the client first became aware of his right of action, unless it can be shown that the defendant used fraud to conceal the wrong done until the right of action for it had been barred by the statute.

In 19 Am. and Eng. Law, 201, entitled "Limitation of Action," under the sub-title, "Occurrence of damage as essential," there is this: "As a general rule the cause of action for a wrongful act, whether negligent or willful, or for the breach of a contract or duty, accrues immediately upon the happening of the wrongful act or the breach, even though the actual damage resulting therefrom may not occur until some time afterward. The statute therefore begins to run upon the occurrence of the act or breach complained of, and not from the time of the damage resulting therefrom.

"Where, however, the cause of action is based upon consequential as distinguished from direct damages, and involves an act or omission that might have proved harmless, the cause of action must be taken as accruing only upon the actual occurrence of damage so that the damage only runs from that time."

Going back again to that case of the Church of the Holy Communion against Paterson Extension Railway, the whole theory, and the thought I got, Mr. Rosenkrans, is that in a case of this character where they grow out of a contractual relation between the plaintiff and the defendant, if the defendant was guilty of a breach of duty with respect to his contractor, in that he did not use the skill and care exacted of him, he breached his contract immediately; at least, that he made the result of

his work known to and put in the possession of the person with whom he was contracting——that in this case would have been, as you allege, I think, in 1907, when the result, the fruits of his work, whether correct or incorrect, valuable or invaluable, were delivered by him to the plaintiffs in this action——the harm was then done; his wrongful act was then done and then consummated, and the right of recovery then existed. Whether or not there was an actual damage is a matter of no consequence. Whether or not the plaintiff then knew is a matter of no consequence. Of course the statute of limitation is not, we will say, a summary statute at all; it is not a statute of right at all, but is a statute which our legislatures have given us for the purpose of aiding us, at some time, to put an end to litigation, and of course can only be invoked when it is specifically pleaded.

It seems to me, from what consideration I have been able to give the matter, and I have given it all the faithful consideration and all the research I have been able to give it, since adjournment of court yesterday to this time, that the right under the statute of limitation, as alleged in this matter, is well and properly alleged Mr. Rosenkrans, and this action is not brought within six years from the accrual of the right of action. That accrual of the right of action having, as I interpret the authorities, at the time when you alleged the result of the work and the completion of the contract as between the plaintiffs and defendant matured and happened, and that was in the year 1907. The statute has run against it sometime in the year 1913. The present action, as the transcript shows me, was not commenced until March 13, 1916, a matter possibly of from two to three years after the statute of limitation had run and the remedy was at an end.

As I said before, in the case of Troup against

Smith, as to that case——it is the only one which I have been able to find where an action was against a surveyor because of a negligently or incorrect survey, and I have examined every authority and found none except the one which I am now to refer to——I don't think that that case varies from the authorities that I have otherwise found; if anything, it will be more favorable to you than otherwise; and my opinion is therefore my conclusion is, that the action is brought out of time.

Now, in what shape was this case? It was rather informally brought up. I don't know whether——the plaintiff had opened and you had opened, and I think I called your attention to these two defences of law set up by your answer. I don't know that there has been informal——you immediately started to argue the questions, I think

MR. MACKAY: I think I moved for a non-suit, and then afterwards I think you said this was in the nature of a demurrer.

THE COURT: I think there has been no formal motion at all. I rather took it up myself immediately after the opening; then looking at the pleadings, I found the defences at law which you said you would urge upon the trial.

MR. MACKAY: Then I make the motion for a non-suit on the ground that the action is barred by the statute of limitation.

THE COURT: In accordance with the reasons I have urged, gentlemen, I will direct——

MR. ROSENKRANS: I raise the same objection as before.

THE COURT: I will consider, gentlemen, this motion, although made now, as having been made immediately after the opening, and that the argument that has taken place by both counsel will be considered, and the objections thereto, shall be considered as objections to this motion, and the argument shall be considered as addressed to the motion

and what the Court has said as to its finding and conclusion is also addressed to the same point. A non-suit——

MR. ROSENKRANS: So as to make it a part of the record?

THE COURT: So as to make it a part of the record. I am perfectly willing that it should be. I presume that it should be, so that if the matter is contested further, the whole thing may be before the Appellant Court.

The Motion for a non-suit is granted. A verdict will be directed.

MR. ROSENKRANS: I ask for an exception.

THE COURT: You may have it.

New Jersey Court of Errors and Appeals.

WILHELM GOGOLIN, et ux., Plaintiffs-Appellants,	On Appeal
vs.	from
ALFRED W. WILLIAMS, Defendant-Appellee.	Supreme Court.

Brief of Plaintiffs--Appellants.

I.

STATEMENT.

The appeal in this case is from a judgment of the Supreme Court of non-suit against the appellants by the Judge of the Bergen Circuit, on the pleadings, then consisting of the Complaint, Motion to strike out, Order denying motion to strike out, Answer and Replication, when moved thereto by counsel of the defendant, appellee, on the grounds:—

(1.) Because the Trial Judge held that the Statute of Limitation was a bar to the action set forth in the Complaint:—

(2.) Because the Trial Judge refused to consider an order made by a judge of the same Court denying to strike out Complaint upon application previously made to Minturn, Justice, which motion was likewise based on the Statute of Limitation and on the same ground as before the Trial Judge.

The complaint alleges that in the year 1907, plaintiffs employed the defendant, a Civil Engineer and Surveyor, to survey lands owned by them, and that the defendant for reward undertook as an Engineer and Surveyor to survey the plaintiffs' lands, and in pursuance of such employment and agreement made a survey and map entitled "Property of Wm. Gogolin, Rochelle Park, Bergen County, N. J., Scale 50 ft. pr. inch Alfred Williams, Civil Engineer and Surveyor, Hackensack, N. J. 1907." and informed plaintiffs that the said map and survey were a correct map and survey of the lands owned by the plaintiffs.

That relying on said map and survey, and in the year 1910, the plaintiffs built or caused to be built, on lands included therein as the property of the plaintiffs', but not in fact, the lands or property of the plaintiffs', or either of them, buildings costing $4000.00.

In the year 1915, the plaintiffs discovered that the survey and map the defendant had made for the plaintiffs was incorrect; that a large tract of land, not belonging to the plaintiffs or either of them, was included in the said survey and map, and that the said buildings had been erected on land, not belonging to the plaintiffs.

That the defendant did not use due and proper care or skill in surveying the lands of the plaintiffs, nor in the return thereof, and that by reason of the defendant's negligence, the plaintiffs were afterwards compelled to purchase the lands wrongfully

and negligently included in the survey as their lands, to their damage of $1200.

Summons was issued in 1916, a period within six years from the time the buildings were erected.

The defendant when served with the complaint moved to strike out on the grounds,

(a) That the complaint disclosed no cause of action, in that, the cause of action has accrued more than six years ago, and the claim is, therefore barred by the statute of limitations, and

(b) Because the plaintiffs have no cause of action at law against the defendant on the facts stated in the complaint.

This motion was argued before Justice Minturn, who, after hearing the parties, denied the motion, and sent a letter advising counsel of the respective parties,

"That the case should proceed to trial, and thereafter the defeated party may appeal and present the question in the light of the testimony to the Appellant Court."

The defendant thereupon filed an answer again setting up the statute of limitation as a bar, and other defences, upon which plaintiff took issue.

When the case was at issue the plaintiff moved for trial in the Bergen Circuit. At the opening counsel of the defendant again moved for a non-suit. Plaintiff opposed the same on the grounds that the statute was no bar and that the question had already been disposed of by Minturn, Justice, upon the order made by him denying the motion to strike out the complaint which was on file with the Clerk of the Court.

Before the trial judge the defendant relied

(1) On the case Troup v. Smith 20 Johnson 33 N. Y. C. L. R. where an action of assumpsit was brought against the executors of John Smith, deceased, who in his lifetime was a

surveyor of land, charging negligence, want of skill and fraud in surveying the lands. The defendant pleaded the statute of limitations, to which plaintiff replied fraud in making the survey, and the unskillful, insufficient and unworkmanlike manner the survey had been made. It was held that the statute was a bar.

(2) The cases mentioned in 25 Cyc., page 1116 note 67 and other cases under same heading were cited, as follows:—

"Malpractice by physicians has been held to fall within the rule of this test. Coady v. Reins, I Mont. 424; Fronce v. Nichols, 22 Ohio, Cir. Ct. Rep. 539. But where a surgeon performs an operation negligently and thereafter is continuously negligent in his care and treatment of the patient, there may be a recovery of damages for the negligent treatment, although the cause of action based on a negligent operation is barred by the statute. Tucker v. Gillette, 22 Ohio Cir. Ct. Rep. 664, where a surgeon in performing an operation left in the person's body a sponge which remained there, causing the patient injury, until the employment of another physician who removed it."

Defendant in his argument and the trial judge further quoted:—

"It has been held that a right of action for a breach of contract in failing to record a mortgage accrues of defendant's failure to perform his duty, and that the statute then begins to run, not when ultimate damage results;" referring to an Att'y at Law who did not record a mortgage when he should have done under his contract of hiring with his clients," not when ultimate damage results (the recording of a second mortgage), or when the defendant's default is discovered or when demand is made." And further

(3) In I Cyc., page 217, "Abstract of Title"

under subdivision A. The right of action against an abstractor for damages resulting from an incorrect abstract accrues at the time the examination is made and reported, and not when the error is discovered, or damage result therefrom." I Am & Eng. Enc. Law page 221 note 5. The statute of limitation begins to run from the time the abstract is furnished, not from the time when the damage occurred. 22 Am & Eng. Enc. Law page 807. "The right of action accrues and the statute begins to run at the time the injury is received, not from the time the damage is developed." 3 Am. & Eng. Enc. Law, page 399. The statute begins to run from the time the cause of action accrued and not from the time of the damages suffered or from the time when the client first became aware of his right of action, unless it can be shown that the defendant used fraud to conceal the wrong done until the right of action for it has been barred by the statute.

Plaintiffs-Appellants principally relied on

(1) The case of Backhouse v. Bonomi 9 H. L. Case 503, 16 E. R. Case page 216 where the statute of limitation is discussed and numerous cases cited and followed:— In that case

"The Lord Chancellor, Lord Westbury, moved that the following question be put to the Judges: "A. B. is the owner of a house, C. D. is the owner of a mine under the house and under the surrounding land; C. D. works the mine, and in so doing leaves insufficient support to the house. The house is not damaged, nor is the enjoyment of it prejudiced until some time after the workings have ceased. Can A. B. bring an action at any time within six years after the mischief happened, or must he bring it within six years after the workings rendered the support insufficient?" HELD that the person who was the origin or author of the mischief

for the cause of action was responsible, and that the statute does not commence to run until the cause of action really accrued, when the actual damage first exhibited itself.

The defendant, a Coal Company, had knocked down the pillars holding up the surface some fifteen years before the action was brought. The plaintiff had no knowledge of these facts. His houses were damaged, and it was held that the statute did not commence to run until the actual injury was sustained by the plaintiff.

This doctrine was followed in the case of the Church of Holy Communion v. Paterson &c., R. R., 37 Vroom, page 218, 49 Atl. Rep. 1030, Court of Errors and Appeals, March Term, 1901 — — — in 1881 a railroad was built near the line of the church property, and in constructing it, the Railroad Co. made a deep excavation near the line of the Church, whereby the foundation wall of the Church was exposed. The building consequently subsided and was damaged. In 1882 as a result of negotiations for the settlement of said damages, the Railroad Co., among other things, built with the acquiescence of the church, a wall with the view of preventing further subsidence and damage. In 1887, the vibration caused by passing trains, resulted in the settling of the wall and in the further subsidence of the church building. An action was brought to recover the last named damages.

Plaintiff further relied on the grounds set forth in reasons 2 and 3, as follows, to wit:—

That the Trial Judge granted a non-suit without taking testimony, notwithstanding that an order had been previously made by a justice of the same court denying a motion to strike out the complaint, which motion in each instance was based on the statute of limitation, see Hanford v. Duchastel 93 Atl. Rep. 586, Court or Errors and Appeals, where

it was held "that an order quashing a writ of attachment is in effect an order in the nature of a "final judgment" and may be reviewed by appeal."

GROUNDS OF APPEAL.

(1) The Trial Judge directed judgment against the plaintiffs and in favor of the defendant, when thereunto moved by counsel for the defendant, whereas, he should have denied the motion for non-suit and proceeded with the trial.

(2) The Court below granted a non-suit upon the pleadings and without taking any discretion whatsoever, notwithstanding that an order had been previously made by one of the Justices of said Court denying a motion to strike out the complaint in said cause upon the same grounds as raised by the attorney of the defendant on his motion for non-suit at the trial.

(3),The motion to strike out the complaint, which was previously denied by a Justice of the Supreme Court was, under our practice in the nature of a demurrer, and having once been passed upon, the Trial Judge in the same Court should have considered the matter as res adjudicata, and should not have entertained the motion for non-suit solely upon the pleadings.

(4) The complaint sets forth a cause of action against the defendant, and the Court should have proceeded with the trial.

(5) Admitting the allegations in Plaintiffs' bill of complaint, the statute of limitations could be no bar to the action therein set forth, and the trial Judge erred in ordering a non-suit on the theory that the statute of limitations barred the action.

(6) The Trial Judge erred in deciding that the statute of limitation began to run from the time defendant made the survey and map, and not from

the time the resultant injuries, by reason of such careless and unskillful and negligent survey, arose against the plaintiffs.

(7) The judgment was in divers other respects erroneous and illegal.

POINT I

THE STATUTE OF LIMITATION IS NO BAR TO THE ACTION SET FORTH IN THE COMPLAINT.

The question presented to this Court is, "When did the Statute commence to run in the action set forth in the complaint?" The defendant says, "When the survey was made," and bases his contention on Troup v. Smith, 20 Johnson 33, New York Common Law Reports, case (p. 26 & 27 Lines 31 next page L. 1 to 20, and further, P 17 L 22-23). In respect to surveying the lands that case is parallel with our case, but in so far as damages are concerned, the case is entirely different .

The suit in that case was for moneys paid for a wrongful survey. Could these moneys be recovered or not, was the only question in issue? In our case we do not sue for moneys for the wrongful or unskillful survey. We admit at this time we cannot recover such moneys. In Troup v. Smith, the wrong was completed when the survey was made. In the case at bar, we say that the wrong for which the defendant is liable was not complete when the survey was made. The wrong was completed when the buildings were erected on lands held out by the surveyor to belong to the plaintiffs, when in fact they belonged to other persons than the plaintiffs. We seek to recover damages

from the defendant, because relying upon the survey being correct, we built on another person's land, shown by the survey to be included in the lands of the plaintiff. When did these damages come into existence? Surely, damages can not arise before they come into existence. The damages arose, came into existence, when the buildings were erected in the summer, month of August, 1910. Summons was issued in March, 1916, a period within six years, when damage first exhibited itself. This brings us to the leading case on the subject, referred to in plaintiff's outline, Backhouse v. Bonomi 9 H. L. Cases 503, 16 E. R. C. page 216, where it was held that the person who was the origin, the author of the cause was responsible, and that in such case, the statute does not commence to run until the cause of action really accrued, when the damage first exhibited itself. We say that the reasoning in that case is applicable to ours. In that case, a coal mining case, when the pillars were knocked down there was no cause of action, no damages. When the houses fell down actual damage first exhibited itself. That cause of action accrued when the damage exhibited itself. In our case, damage first exhibited itself when the houses were built. The person knocking down the pillars in the Coal Company case and the person making the survey in our case, are the persons who are **the origin, the authors, of the mischief resulting in damages.** These are some of the elements which distinguish the case at bar from Troup v. Smith, relied upon by defendant.

The case of Backhouse v. Bonomi is within the theory of the complaint and was followed in this state in Church of Holy Communion v. Paterson &c. R. R. 37 Vroom 218, 49 Atl. Rep. 1030, Court of Errors and Appeals. In that case, it appears that in 1881, the R. R. was built near the line of the

church property, and in constructing it, made a deep excavation, exposing the wall of the church, causing the church building to subside. A settlement was made and release given by the church. Later there was further subsidence creating damages in 1887. Suit was brought in 1891. HELD that the injury for which suit was brought in 1891 was not barred (although it was 10 years after the excavation was made) but that the statute of limitation began to run from the time the **new cause of action first arose** in the year 1887. SAID DEPUE, C. J. It is this **independent, the fresh cause of action** for which the defendant is liable, and that the injury for which suit was brought being a new cause of action arising in 1887 limitations began to run from that date, and that the injury for which suit was brought was entirely distinct from the first exavation. In the church case no action could have been maintained by the church to recover damages by reason of the defective construction of the wall, because the damages at that time did not exist, damages had not occured nor resulted. Neither in the present case when the survey was made could the plaintiffs have brought an action for the damages they now seek to recover. The damages did not exist when the survey was made, they had not yet occurred nor resulted, in fact they were not anticipated nor in the minds of the parties. As in the Church case, the statute could not commence to run until there was a cause of action and until damages were actually sustained. The statute in the present case began to run when the **new independent cause of action arose,** i. e. when the building was being erected.

To support the motion for non-suit, the Trial Judge further quoted the case of Gillette v. Tucker: a case of Malpractice by a Physician; The failure of an Att'y to record a mortgage resulting in dam-

age, and the blundering of an Abstractor to set forth liens duly recorded. I will take these up in their order. (Case p. 27 line 35, ps. 28, 29 and 30) taken from 25 Cyc., page 1116 note 67, Gillette v. Tucker, where a surgeon left a sponge in the body of the patient, and, HELD that the statute commenced to run at the time the sponge was left in the body, or if the surgeon continued to attend upon the patient, from the time the relation of physician and patient was at an end. This is a simple, plain and just rule of law, but does not apply to our case. When the surgeon left the sponge in the body the cause of action arose, it was complete, the statute commenced to run, or where the surgeon continued to attend the patient, that is where the wrong was performed coupled with the continual attendance, the action was joined, one cause for malpractice, and one cause for the services, which were bound to be useless as long as the sponge remained in the patient's body, then the cause was completed and the statute commenced to run, when the contracual relations were at an end and broken off. No new, independent cause of action arose between the physician and his patient. This reasoning does not apply to the case at bar.

The failure of the Att'y to record a mortgage allowing other bona fide liens to intervene, (C. p. 31 lines 1 to 15) resulting in damages, or wiping out the unrecorded mortgage. This case is not parallel to the one now before this Court. If I fail to record a mortgage, the wrong is completed. Damages may be six cents or they may be the whole amount. The mortgage money has been paid upon the execution and delivery of the bond and mortgage. The subject of such a suit has been created. There may be ultimate damages but that is not a new cause of action. In the Coal Co. case and in the Church case cited in support that the

statute does not run, original wrongs were not the sole dispute, they only formed part of it. They were only the origin, not the cause of action.

An Abstractor of Title, (C. p. 33 lines 3 to 20). I make an abstract. I omit to set forth effective liens. My client is damaged, or my carelessness, omission, failure or neglect results in damages. When does this cause of action arise? In either event the cases hold, cited by defendant, from the time my omission is made. The wrong is then made, then complete. Consequential damages, ultimate damages may result. That is not the criterion. When the omission is made, the cause of action is ripe. They may not have been discovered and still the damages exist, and the statute commences to run, Freeholders v. Veghte, 44 N. J. L. 509, where the defendant appropriated moneys belonging to the County not discovered until the defendant went out of office more than six years after his embezzlement, and HELD, that the wrong was completed when he, the defendant, took the moneys. Discovery, consequential or ultimate damages is not what governs the decisions. In none of the cases cited by Counsel of the Defendant, or the Trial Judge, are there the essential elements present, i. e. the new, independent fresh cause of action. In so far as the cases cited involve public records, I might say that public records are notice to the world and ignorance or failure to set them forth is no excuse. Every one is presumed to know them in the eyes of the law. The Trial Judge further quoted, I Am. & Eng. Enc. Law 221 not 5; 22 Am. & Enc. Law 807; 3 Am. & Eng. Enc. Law 399 and 19 Am. & Eng. Enc. Law 201, (Case p. 33 lines 30 to 40 and page 34 lines 1 to 30) but we say that they are not in point for the same reasons as above set forth. I have not been able to find a case in

any of the reports which hold that the statute of limitations commences to run before the cause of action exists.

If the decision of the Court of Errors and Appeals in the Church case, supra, is sound in principle, then this cause of action should be tried, the non-suit should not have been granted. The case at bar, the Church case, and the Coal Co. case, all have in common a **negligence on the part of the defendant, which is the real origin and cause — —** the real origin and primal cause — — of the injury sued for. Each case has in common, **this new, independent, fresh cause of action.**

In the Coal Co. case, the knocking down of the pillars; in the Church case the defective and inadequate construction of the wall; in the present case the wrongful survey of the land. In all three cases, there is an ensuing cause contributing to the injury sued for, in either case was the plaintiff blameworthy. In the present case, the plaintiff, in good faith and relying upon the accuracy and truth of the defendant's survey, built on the ground represented by the map and survey to be the property of the plaintiffs.

In neither of these three cases **is the primary act of negligence the subject of the action.** In each case suit was brought for the new, fresh, independent cause. In neither case was the injury complete, nor was it by either party apprehended, at the time of the primary negligence. The particular injury sued for, could in neither instance have been sued at the time of the primary negligence. The **wrong was then incomplete,** the present cause of action then did not exist.

Itis this element — — the want of completeness, the want of existence of the wrong, which are lacking in the authorities furnished by the defendant and which are upheld by the authorities of

plaintiff, to wit, the Coal Case, the Church Case and cases followed and cited therein.

POINT II

THE ORDER MADE BY JUSTICE MINTURN WAS IN THE NATURE OF A FINAL JUDGMENT. THE TRIAL JUDGE ERRED IN GRANTING THE SECOND MOTION OF DEFENDANT. THE TRIAL JUDGE SHOULD HAVE PROCEEDED WITH THE TRIAL.

The order made by Justice Minturn (Case p. 7) in pursuance the motion made by defendant (Case p. 6) was in the nature of a final judgment. The order was accompanied by a letter (Case p. 8) advising respective counsel that after the trial the defeated party could present the question in the light of the testimony to the Appellate Court. In the case of Hanford v. Duchastel, 93 Atl. Rep. 586, Court of Errors and Appeals, New Jersey, a Writ of Attachment was issued upon the usual affidavit. Defendant moved to quash the Writ, Chief Justice Gummere, after hearing the argument, made an order quashing the writ of attachment on the ground that the affidavit did not set forth a good cause of action. An appeal was made to this Court, and HELD that an order quashing a writ of attachment is in effect an order in the "nature of a final judgment" and may be reviewed by appeal. If the defendant in this cause was dissatisfied with the order of Justice Minturn and the result of the trial was adverse to him, his remedy was to appeal.

CONCLUSION.

I respectfully submit that the complaint sets forth a good cause of action; that the statute of

limitation is no bar to the action, and that the Trial Judge erred in granting defendant's motion for a non-suit.

LEONARD VAN LENTEN,

of Counsel with

PLAINTIFFS—APPELLANTS.

New Jersey Court of Errors and Appeals.

WILHELM GOGOLIN and LENA GOGOLIN, Plaintiffs-Appellants, *v.* ALFRED W. WILLIAMS, Defendant.	An Appeal from New Jersey Supreme Court.

BRIEF OF MACKAY & MACKAY, IN BEHALF OF ALFRED W. WILLIAMS, DEFENDANT-APPELLEE.

This suit was brought to recover damages for alleged negligence on the part of the defendant-appellee in making a map and survey of the lands belonging to the plaintiffs-appellants.

The work as alleged in the complaint was completed and the services performed in the year 1907. In the same year the survey and map were delivered by the defendant-appellee to the plaintiffs-appellants. In 1910, three years after the completion and delivery of the survey and map the plaintiff erected two dwelling houses and alleged that in 1915, five years after the houses were erected, they discovered that the survey and map included property which did not belong to the plaintiffs and which the plaintiffs subsequently were obliged to purchase and by reason thereof claim to have paid the sum of fifteen hundred dollars for the additional land.

The defendant, through his attorneys, served a notice to strike out the complaint on the ground that it did not disclose a cause of action, and that the act, if any, was barred by the Statute of Limitations. This motion was argued by the respective counsel before the Hon. Justice James F. Minturn, on which he reserved decision, and later, on May 19, 1916, wrote a letter to John J. Slater, Esq., County Clerk at Paterson, N. J. (State of the Case, p. 8). The case was brought on for trial and at the trial the defendant raised a question as to the Statute of Limitations and asked for a non-suit on that ground. After a lengthy argument in which the law on both sides was discussed by the Court and respective counsel (State of the Case, pp. 13 to 37 inclusive), the Court directed a non-suit. From the judgment entered by the order of non-suit this appeal has been sued out.

POINT I.

The Statute of Limitations is a bar to the action set forth in the complaint.

This was an action for an alleged breach of contract which was a contract of employment. The terms of the employment were that the defendant, who is a civil engineer and surveyor, was employed to survey lands of the plaintiffs. The survey was completed and the map delivered to the plaintiffs by the defendant in the year 1907. As soon as the map was delivered and accepted by the plaintiffs the defendant's contract of employment was at an end, and from that time the Statute of Limitations would begin to run. The plaintiffs allege that the defendant committed a breach of duty in the performance of his

contract and because of such breach, subsequently, nearly eight years after, the plaintiffs suffered damage which did not accrue until eight years after the completion and termination of the contract.

> "It is well settled (with the exceptions hereinafter noted particularly in the case of covenants and indemnity contracts) that the occurrence of an act or omission whether it is a breach of contract or of duty whereby one sustains a direct injury, however slight, starts the Statute of Limitations running against the right to maintain an action. It is sufficient if nominal damages would be recoverable for the breach or for the wrong. The fact that the actual or substantial damage is not discovered or does not accrue until later is unimportant. The act itself, which is the ground of action, cannot be legally separated from its consequences. In addition to the following cases, supporting the above rule, see the cases cited throughout the first subdivision of this note" (Am. & Eng. Ann. Cases, Vol. 13, p. 696, note and cases cited).

The case under consideration is parallel with an action against an attorney for negligence or unskillfulness in the performance of their professional duties. A number of cases are set out in the note to Vol. 13, Am. & Eng. Ann. Cases, page 697, as follows:

> "The Statute of Limitations begins to run as to actions against attorneys for negligence or unskillfulness in the performance of their professional duties from the time of the breach of duty and not from the time of actual damage." [See Wilcox *v.* Plummer, 4 Pet., 172, 7 U. S., (L. Ed.), 821.]

The case above cited was an action against an

attorney for the recovery of damages for neglect to institute a suit, upon a promissory note, and the Statute of Limitations was pleaded and the syllabus of the case is as follows:

> "A promissory note, was by the plaintiff, placed in the hands of P. for collection. He instituted a suit in the State Court thereon against the drawer on the 7th of May, 1820, but neglected to do so against the endorser. The drawer proved insolvent. On the 8th of February, 1821, he sued the indorser but committed a fatal mistake by a misnomer of the plaintiffs; upon which, after passing through the successive Courts of the State, a judgment of non-suit was finally rendered against the plaintiffs. Before that time the action against the indorser was barred by the Statute of Limitations, to wit, on the 9th of November, 1822. This suit was instituted on the 27th of January, 1825. The Statute of Limitations of North Carolina interposes a bar to actions of assumpsit after three years.
>
> "The questions in the case were whether the Statute of Limitations commenced running when the error was committed in the commencement of the action against the indorser, or whether it commenced from the time the actual damage was sustained by the plaintiffs by the judgment of non-suit. Whether the Statute runs from the time the action accrued, or from the time that the damage was developed or became definite. *Held,* that the Statute began to run from time of the committing the error by the misnomer in the action against the indorser.
>
> "The ground of action here is a contract to act diligently and skillfully and both the contract and the breach of it admit of a definite assignment of date. When might this action have been brought, is the question, for from that time the statute must run.
>
> "When the attorney was chargeable with

> negligence or unskillfulness his contract was violated, and the action might have been sustained immediately. Perhaps, in that event, no more than nominal damages may be proved, and no more recovered; but, on the other hand, it is perfectly clear that the proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict. If so, it is clear that the damage is not the cause of the action" [Wilcox *v.* Plummer, 4 Pet., 172, Vol. 7, U. S. (Law. Ed.), 821].

The facts in the case before this Court on appeal cannot come any closer to the above facts because a civil engineer is in the same category as an attorney at law, and admitting that the defendant-in-error did negligently make the map and survey as alleged, the question before the Court was when did the cause of action for such negligence accrue? Certainly, it accrued when the contract was performed by the delivery of the map and survey, at which time a mistake having been made, a right of action immediately accrued to the plaintiffs-in-error for a breach of the duty by reason of the alleged negligence of the defendant. We have been able to find only one case in which an action was brought for a negligent survey and in addition to the negligence alleged the action was based upon the fraudulent concealment of the action. In the present case there is no fraud of any kind relied upon. Merely the breach of duty or negligence of the defendant.

The case we refer to was cited by us at the trial in the circuit and is a New York case, viz.: Troup *v.* Smith, 20 Johnson, page 33. N. Y. Common Law Reports, and is directly in point with the case under consideration although coun-

sel for the plaintiffs-in-error in his brief contends that the suit was brought for moneys paid for the wrongful survey. This statement in the brief of the counsel for the plaintiffs-in-error is misleading as it appears as though the suit was brought to recover moneys paid by the plaintiffs to the deceased surveyor; which was not the case. The suit was brought to recover moneys paid to another surveyor amounting to the sum of fifteen hundred dollars for procuring a particular, accurate and perfect survey. The opinion was written by Spencer, Chief Justice, and on page 43, second column, the Chief Justice, said as follows:

> "It was urged on the argument, that the plaintiff's cause of action might be considered as accruing, when he discovered the fraud in making the survey by the testator, or that the Court might say that this case, and others similarly circumstanced, were not within the spirit and intent of the statute. It will readily occur to the profession, that the Courts of law have in many instances, introduced great refinements in the construction of statutes, and that in some instances, judges of great celebrity have deplored the first aberration from the plain and natural meaning of the words of the statutes. With respect to the statute now under consideration there has been great latitude of construction going almost to its abrogation. I mean as to what amounted to an acknowledgment of a debt, so as to take it out of the operation of the statute; and, of late, courts of law are travelling back to the support of the plain and obvious meaning of the enactment.
>
> "After premising thus much, the inquiry is, when did the plaintiff's cause of action accrue? Most certainly when the fraud was consummated; and that was when the testator had completed the survey, as far as it was

> completed, and made returns of his field notes, maps and plats and received his compensation. The injury as far as he was concerned was then done; and he became immediately liable to an action for the fraudulent and imperfect manner of executing the duties he had assumed. The fact that the plaintiff did not discover the imposition practiced upon him, is entirely distinct from the existence of such fraud an imposition. If, then the plaintiff's cause of action accrued upon the consummation of the fraud by the testator and not at the time the plaintiff discovered it, the statute interposes as a protection, unless the action has been commenced and sued within six years next after the cause of action accrued."

The particular distinction between the case under consideration and the case cited by counsel for the plaintiffs-in-error, viz.: Church of the Holy Communion *v.* Paterson, &c., R. R., 37 Vroom, 218, 49 Atl. Rep., 1030, is that after the defendant-in-error had completed the map and survey and delivered the same and received his compensation no further act or acts of any kind were committed by him, whereas in the Church of the Holy Communion *v.* Paterson, &c., R. R., the Court found there was a continuing injury by reason of some negligent acts on the part of the defendant; namely, the negligent operating of their trains.

Counsel for the plaintiff-in-error, on page 12 of his brief, says, An Abstractor of Title (C., p. 33, lines 3 to 20) I make an abstract. I omit to set forth effective liens. My client is damaged, or my carelessness, omission, failure or neglect results in damages. When does this cause of action arise? In either event the cases hold, cited by defendant, from the time my omission is made. The wrong is then made, then complete. Consequential damages, ultimate damages may result. That is not the criterion. When the omission is

made, the cause of action is ripe. They may not have been discovered and still the damages exist, and the statute commences to run, Freeholders *v.* Veghte, 44 N. J. L., 509, where the defendant appropriated moneys belonging to the county not discovered until the defendant went out of office more than six years after his embezzlement, and *Held,* that the wrong was completed when he, the defendant, took the moneys. Discovery, consequtial or ultimate damages is not what governs the decisions. In none of the cases cited by counsel of the defendant, or the Trial Judge, are there the essential elements present, *i. e.,* the new, independent, fresh cause of action.

Why isn't the defendant Alfred W. Williams in the same category with the Abstractor of Title? He holds he is advertised as a professional man engaged in the business of making surveys and maps. He enters into a contract, either express or implied, to do a particular thing either for an express sum of money or for what the services are reasonably worth. He performs the services, delivers the survey or map, receives his money and the contract is completed by both parties and at an end. The surveyor may have made a mistake. If he has, the person who employed him may institute proceedings immediately or at any time within six years to recover damages, and the damages may be either nominal or consequential damages up to the period of six years. They would be consequential damages if the owner of land erected a building and ascertained a mistake had been made in the survey. He would come into Court and would allege as the basis of his action the contract for the making of the survey or map. That would be the foundation for a wrong done and the erection of the building would be the consequential damages arising from the failure

to properly perform the contract. If then the cause of action is alleged to have arisen when the contract was completed and the building had only been erected thereon for two years prior to ascertaining the mistake, the cause of action would be said to have run only two years. The Statute of Limitations would therefore have run for two years. And if the building had been erected seven years and no action had been commenced until that time, the time of the commencement of the running of the Statute of Limitations would be the same, that is to say, the day of the completion of the contract between the parties.

Counsel for the plaintiff-in-error endeavors to distinguish between the case of an abstractor or a surgeon or an attorney, and relies on the case cited in his brief on page 9, the Church of the Holy Communion *v.* Paterson, &c., R. R., 37 Vroom, 218, 49 Atl. Rep., 1030, Court of Errors and Appeals.

There is vast distinction between the two classes of cases. The first is based on the contract, and the second case, that is to say, the Church of the Holy Communion *v.* Paterson, &c., R. R., is founded on negligence because when the release was given in that case, in the first instance, the further sinking of the walls at a period more than six years thereafter was due not to the original act of the defendants but to the subsequent running of their trains over the railroad which was negligent in itself, and which was a new act of the defendant that gave the plaintiffs the cause of action in negligently running their trains so as to cause damage and injury to the plaintiffs. It was what was called a continuing damage or injury by reason of the acts of the defendant, its agents or servants.

In the present case before this Court there was no continuing damage or injury. The defendant's contract was completed at least eight years before injury claimed by the plaintiffs occurred and was the result not of any act by the defendant but by an act of the plaintiff himself in erecting his buildings. The only act of the defendant being the completion of the contract back in 1907.

In addition to the above the Courts of our own State, have held in the case cited by the counsel in error for the plaintiff.

> "Courts cannot engraft on the Statute of Limitations exceptions not contained therein however inequitable the enforcement of the statute without such exception may be.
>
> "The fraudulent concealment of a cause of action does not justify the inference of a new promise, which will take the action out of the operation of the statute at law; nor does it estop defendant from setting up the bar of the statute at law. Relief in such cases must be sought in a court of equity."
>
> Board of Freeholders Somerset Co. *v.* Vighte, 44 L., 509.

Now, therefore, if the Courts of New Jersey hold that the fraudulent concealment of the cause of action will not permit the Statute of Limitations from running, they, certainly, will not say that negligence or omission by the defendant in error will prevent the Statute of Limitations from running until the plaintiffs-in-error by some act of their own increases their own damage by erecting the house upon the property.

The case might be different if the defendant had erected the houses on the land and told the plaintiffs that they were on their land.

"As a general rule, where the jurisdiction of courts of equity and law is concurrent, if a recovery at law is barred by delay, no recovery can be had in equity."

Tooker *v.* National Sugar Refining Co., 84 Atl. Rep., 18.

"Where an attorney at law is guilty of negligence or breach of duty in performing services for his client, the client's cause of action accrues and the statute begins to run at the time when the negligence or breach of duty occurs, not at the time it was discovered or actual damage results or is fully ascertained; and it is immaterial whether the remedy invoked is assumpsit or a special action on the case, for the gist of the action is the attorney's breach of contract to use diligence and skill, and the subsequent damages give no new cause of action."

25 Cyc., page 1083.

"In cases of negligent performance of a contract or neglect of some duty imposed by contract the cause of action accrues and the statute begins to run from the time of the breach or neglect, not from the time when consequential damages result or become ascertained; for the cause of action is founded on the breach of duty not on the consequential damage and the subsequent accrual or ascertainment of such damage gives no new cause of action. In such cases the form of the action whether case or assumpsit is immaterial."

25 Cyc., page 1116.

The case of the Church of the Holy Communion *v.* Paterson, &c., R. R. was also before the Court of Appeals in 1902, and Justice Collins who wrote a dissenting opinion in which the Chan-

cellor and Justice Garrison concurred, said at page 412, 68 N. J. law:

> "It is well settled that in the case of torts arising *quase contractu* the statute begins to run from the date of the tort, not from the occurrence of actual damage. Ignorance of the facts on the part of the plaintiff will make no exception to the rule, though he discovered his injury too late to have a remedy" [Woods *v.* Linn (3d. Ed.), Sections 177 and 179].

POINT II.

The order made by Justice Minturn was not in the nature of a final judgment.

We fail to see where there is anything of importance contained in Point Two of the brief of counsel for the plaintiffs-in-error as by referring to the order made by Justice Minturn (State of the Case, p. 7), it appears that the order was simply an order denying a motion made by the attorneys for the defendant to strike out the complaint. The last two paragraphs of the order recites:

> "It is on this 16th day of May, 1916, ordered that the said motion is hereby denied but without costs.
>
> "It is further ordered that the defendant have leave to file an answer to the said complaint within ten days after the service upon him or his attorneys of a copy of this order."

Now, then, if the justice ordered the defendant to file an answer and the defendant wanted to avail himself of the defense of the Statute of Limitations he was compelled to set up in his answer a plea of the Statute of Limitations. If

he had not done so he would have waived his defense and therefore being part of the answer and being specially pleaded the Trial Court had a right to consider the question as to whether or not the Statute of Limitations was a bar.

Take the plaintiffs' contention and say that the case did go to trial and the evidence was all in, was the Trial Court going to submit the proposition as to whether the Statute of Lmitations applied to the jury, most certainly not.

The plea of the Statute of Limitations is a plea in bar and whether the Statute has commenced to run is a question of law for the Trial Court to decide and which the Trial Court rightfully decided.

We respectfully submit that the judgment of the Bergen Circuit Court be affirmed, with costs.

MACKAY & MACKAY,
Counsel for Defendant-Appellee.