New Jersey Court of Errors and Appeals

THE E. O. PAINTER FERTILIZER CO.,
a corporation, etc.,
Plaintiff-Appellant,

v.

THE KIL-TONE COMPANY,
Defendant-Respondent.

Action at Law.
On Appeal from the Supreme Court's Judgment of Nonsuit.

BRIEF OF PLAINTIFF.

I.

In the latter part of the year 1913, plaintiff, which for many years had engaged in the fertilizer business in Florida, purchased from defendant, which was engaged in business in New Jersey, a quantity of Kil-Tone, a substance which plaintiff asserts that defendant, through its agents and servants, represented would act as an insecticide and a stimulant to tomato plants. Thereupon plaintiff resold the Kil-Tone to one T. J. Peters (who was engaged in the business of raising tomatoes near Peter Station, in Dade County, Florida), without breaking the original packages, wholly relying upon the representations of defendant's agents, which had also been made in the presence of Peters, and upon the strength of which plaintiff had made the purchase from defendant and Peters had bought from plaintiff in the original packages.

Early in the year 1914, Peters applied the Kil-Tone to a large tract of his growing tomato plants,

which instead of proving beneficial to the plants destroyed them.

Peters claimed to have sustained thereby a loss of about $12,000 and demanded reimbursement from the Painter Company, which in turn called upon the Kil-Tone Company to investigate and defend the claim, but which the Kil-Tone Company refused to do. Peters thereupon instituted suit against the Painter Company in Florida, upon the theory that it was the representative of the Kil-Tone Company in effecting the sale of the deleterious substance to Peters. The Painter Company again called upon the Kil-Tone Company to defend the suit or to assist the Painter Company in its defense, but the Kil-Tone Company again refused so to do.

The Painter Company contested the suit in Florida, but Peters was successful in obtaining a judgment against it for $4,117.77 damages and $54.65 costs, a total of $4,172.42, which was entered on or about May 23, 1922, and which the Painter Company later and before the commencement of the present action was obliged to pay.

The Painter Company thereafter brought a suit against the Kil-Tone Company in the United States District Court for the District of New Jersey, based upon the theory of (1) misrepresentation by the Kil-Tone Company, and (2) breach of implied warranty. In that suit, the Kil-Tone Company, in addition to formal denial of the general allegations of the complaint, set up as separate, special defenses (1) the statute of limitations, (2) release, and (3) lack of privity between the Kil-Tone Company and Peters. Issue was joined thereon. By stipulation it appears that the defense of the statute of limitations was brought on for argument as on a motion to strike out the complaint, instead of being determined as an issue

on the evidence produced at the trial; and the notice to strike out was based upon the grounds that (1) the alleged cause of action shown on the face of the complaint did not accrue within six years from the commencement of the suit, and (2) the complaint set forth that the injury complained of occurred more than six years prior thereto. The District Court held that the action, based upon breach of warranty, was barred by the six years' statute of limitations applicable to actions for breach of contract. Thereupon a rule was entered which struck out the complaint on that ground.

The other issues in the case were not disposed of.

Thereafter, on June 12, 1925, the present action was commenced in the Supreme Court. A comparison of the complaints will show that Counts 1 and 2 of the present complaint are similar to the two counts which constituted the complaint in the District Court, but that Counts 3, 4, 5 and 6 set up entirely new and different causes of action: Count 3 alleges a careless and reckless disregard of truth in defendant's representations of the efficacy of the Kil-Tone product; Count 4 alleges a wilful defrauding of plaintiff by defendant; Count 5 is for money paid by plaintiff for the use of defendant, arising from the Painter Company's obligatory payment to Peters of the judgment of the Florida Court; and Count 6 seeks a recovery from the present defendant *aequo et bono* because of the Painter Company's obligatory payment to Peters of the Florida judgment, for which plaintiff contends the Kil-Tone Company was really liable.

The defendant in the present suit, in addition to the formal denials of the general allegations of the complaint, again set up as separate, special defenses (1) the statute of limitations, (2) release, and (3) lack of privity, as in the District

Court suit, and also pleaded, (4) *res adjudicata,* that the District Court had rendered final judgment, upon the merits of the case in favor of defendant and against the plaintiff, adjudging that plaintiff's action was barred by the statute of limitations, and that the present cause of action is the same as that adjudicated by the Federal Court.

Plaintiff again joined issue on the affirmative defenses, and replied specially to the defense of *res adjudicata* by setting forth at length the record of the proceedings in the United States Court.

Plaintiff also objected in point of law that the defenses of the statute of limitations and *res adjudicata* did not constitute legal defenses to plaintiff's causes of action.

These points of law were brought on for argument on motion, pursuant to the practice, in advance of trial.

The Court on that motion determined (1) that the order of the United States District Court was a mere practice motion and not *res adjudicata,* but that (2) the statute of limitations barred plaintiff's present action.

Thereafter the case came on for trial at the Cumberland Circuit, and the Court, in harmony with the previous determinations, ruled that the United States District Court proceedings were not *res adjudicata,* but granted a nonsuit because of the bar of the statute of limitations. Judgment of nonsuit was thereupon entered in favor of defendant, and from that judgment plaintiff now appeals.

II.

The Statute of Limitations has not operated to bar plaintiff's present action.

Plaintiff would have been held to have sued prematurely, with no damages that could be proven, and the possibility of no damage at all, up to the time the Florida Court determined it was liable to pay Peters in the suit brought by him against it.

Semble.—A constable who has been compelled to pay the debt of the defendant against whom he has executions, may recover from him the amount thus actually paid in an action for money paid, laid out, etc., for the use of such defendant.
Ferrell v. Rodgers, 1 N. J. Law 228 (Reprint p. 265) (1794).

Defendant sold a property as broker for complainant for $6,000 and received $300 as commissions, which was paid to her by the purchaser as part of the $6,000 purchase price, it having been agreed between her and complainant that she should retain all received for the property above $5,700. Later the sale was held invalid and was set aside by a decree of the Court of Chancery, and the complainant was thereby obliged to repay the $6,000 to the purchaser. Complainant thereupon filed a bill in Chancery against the broker for the return of the $300 which she had received as commissions.

> *Held*: That the defendant was entitled to commissions only upon a valid sale, and that complainant having paid the $300 to the purchaser under the decree of the Court, such payment was compulsory in defendant's behalf, and that therefore the law implied a promise by defendant to repay it to complainant. *Held, further, however,* that complainant's remedy to recover such payment

was adequate at law *in assumpsit,* and for that reason the bill was dismissed.

"Mr. Chitty says the count for money paid is supported if the payment were made at the express or implied request of the defendant and that it is clear that if money be paid by a person in consequence of a legal liability to which he is subject, but from which a third person ought to have relieved him by paying the amount, a request will be implied. (*1 Chit. Pl. 351.*)

"Surely the complainant was under a legal liability to pay Fornarotto the $300 and that liability was cast upon him by the decree of this Court. Just as surely Mrs. Fisk ought to have relieved him from the burden by paying the amount herself. *Ergo,* the law implies that the complainant has made the payment at the request of Mrs. Fisk, and therefore he can recover the amount from her *in assumpsit.*"

Volker v. Fisk, 75 N. J. Eq. 497 (1909).

Defendant, at the request of her mother, paid off a mortgage of $4,000 in December, 1880, upon the promise of her mother to execute another mortgage to defendant on the land thus exonerated by the discharge of the $4,000 mortgage. This new mortgage, however, was never executed. Upon bill for partition, filed 27 years later, defendant asked to have a mortgage of $4,000 on the lands established as an equitable lien.

Held: Her remedy at law *in assumpsit* was complete when she paid the $4,000 for her mother, and the Statute of Limitations barred her right after six years, and that equity would follow the law and also bar it after that time.

Clark v. Van Cleef, 75 N. J. Eq. 152 (1908).

This was a suit in equity by a surety who had paid the debt of his principal, to compel contribution by the heirs at law of his co-surety. Plaintiff

and defendants' ancestor had been sureties on a bond of a guardian. Defendants' ancestor, who was plaintiff's co-surety, died and his estate administered and closed before any breach occurred upon the guardian's bond. Under the Massachusetts law, no suit could be brought against the administrator of the co-surety, but the heirs or devisees of legatees, to the amount they received assets of the estate, were liable for the debt. No suit, however, could be thus maintained unless commenced within one year after the time when the right of action first accrued. Plaintiff finally paid as surety on the guardian's bond.

Held: The suit being brought within one year from the time of the payment of the money by the plaintiff, is not barred by the Statute of Limitations.

Per SHAW, C. J., at pages 388-389:

"The first question arises upon this limitation. It appears that Catharine Kimball, one of said minors, came of age, and intermarried with one Henry T. Grout; that some ineffectual efforts were made to obtain a settlement of the guardian, after which he was regularly cited into the probate court, and settled his account, exhibiting a large balance of the property of the ward in his hands in January, 1837. On the same day, a demand was duly made on the guardian for that balance, who neglected paying it. Here was undoubtedly a breach of the bond, on which the party in interest had a right of action against the plaintiff as surviving surety, and against the heirs, devisees and legatees of the deceased surety, as well as against the principal. The plaintiff in fact was not compelled to pay, and did not pay the amount of such balance, until November, 1838, which was more than one year after the breach of the condition of the bond. Now the defendants contend that as

they could not be held responsible to the obligee for such breach of the bond, after one year, so they would not be held liable for a contribution to a surety, after that time. But the court are of the opinion, that the statute of limitations cannot be so applied. It may well be admitted, that the statute of limitations would be a good bar to an action by the obligee against the heirs and legatees; but the right of action by the surety for contribution does not accrue at the breach of the bond, but upon his payment of the money, pursuant to that breach. The suit against *him* is not barred in one year. Besides, such suit may be brought within the year, but not come to judgment till long after the year; and he cannot be compelled to pay, until judgment is recovered, although he may pay sooner on demand, after a breach, if he choose to do so. But his right of action for contribution, arises when he does pay, and not before. *Notwithstanding a breach, the debt may be paid by the principal, or relinquished, or compromised, and the surety never compelled to pay. If so, he never has a cause of action against the co-surety or his representatives.* The right of action grows out of the original implied agreement, arising out of there being co-sureties, that if one shall be compelled to pay the whole or a disproportionate part of the debt, for which both thus collaterally and provisionally stipulate to be liable, the other will pay such a sum, as will make the common burden equal; and in case of the death of either, this obligation devolves upon his legal representatives. This suit being brought within one year from the time of the payment of the money by the plaintiff, is not, we think, barred by the statute of limitations."

Wood v. Leland, 1 Metc. (Mass.) 387 (1840).

Defendant owned certain land in common with plaintiffs' testator. Timber was sold off the land by defendant, who received payment therefor some time later in cash, notes, and other real es-

tate. In the suit brought to recover one-half the amount realized from the sales, defendant pleaded the Statute of Limitations, averring that the sales had been made more than six years before.

Held: "The statute began to run from the time when the money was received, and not from the time of the sale of the wood. * * *

"In regard to the objection that the price of some of the wood was received in real estate, we think, as the sale was made for money, the defendant was answerable for the price when he discharged the purchaser, whether he received cash or anything else. He may be considered as the purchaser of the real estate with the money for which he sold the wood. The plaintiff consents to the sale for money, but not that real estate shall be substituted. Suppose after selling the wood for money to be paid at a future day the defendant had set off a debt which he owed the purchaser for the price; he would virtually have received the money. So he has by taking the real estate."

Miller v. Miller, 7 Pick. (Mass.) 133 (1827).

"Under this principle where goods are sold with a warranty to a dealer, it must be assumed that the dealer may resell them with a similar warranty to a sub-purchaser. Accordingly, if this is done *and the sub-purchaser recovers damages from the original buyer* the latter has a *prima facie* right to recover these damages against the seller who originally sold them to him."

Williston on Sales, Vol. 2, p. 1483 (2d Ed.).

Sale of wool by specific description. Defendants acted as brokers or agents of plaintiff. Bulk did not correspond with samples or description.

Held: Where goods are sold by description for the purchaser of re-sale and do not answer the description, the vendee may recover in addition to his anticipated profits the damages

which he is under obligation to pay to his subvendee when those damages are such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of its breach.

Lissberger v. Kellogg, 78 N. J. Law 85 (1909).

Bill for accounting for share of profits in building a railroad. The work was completed in 1869 and resulted in substantial profits. Extended litigation, however, was not ended until 1877. An account was rendered between the parties in 1874. The defendant pleaded the Statute of Limitations.

Held: It was impossible to determine what were the profits until the termination of the last of the litigations referred to. The general rule is that the cause of action or suit arises when and as soon as the party has a right to apply to the proper tribunals for relief. Hence the statute had not run.

Culver v. Culver, 31 N. J. Eq. 448-50 (1879).

Carter mortgaged a horse to B for $100. Afterwards Carter sold it to Currier without notifying him of the mortgage, who later sold it to Sargent. Eventually it was bought by F. None of the intervening owners knew of the mortgage to B. Thereafter B took the horse under his mortgage and sold it to S. F afterwards paid S the $100 and re-took the horse. He then demanded of his vendor the $100 he paid S and it was paid him. Each successive pre-vendor paid his vendee the $100 until Sargent demanded it of Currier, his vendor, who refused to pay it. This suit was brought within six years from the date of payment of the $100 to S, but more than six years after the horse had been sold by defendant to plaintiff.

Held: When defendant exchanged horses with plaintiff, defendant impliedly warranted the title to the horse to plaintiff, and defendant thereby became answerable to plaintiff, in case the title became defective, whether defendant knew of the defect or not. * * * The property could not be relieved of the mortgage except by payment, and the payment by plaintiff was therefore compulsory. Plaintiff was compelled to pay money which defendant ought to have paid, and an obligation to repay plaintiff was thereby implied. The Statute of Limitations is not a bar, because the cause of action did not accrue until the money was so paid.

Sargent v. Currier, 49 N. H. 310 (1870).

Amidon sold lands to W who gave back a bond and mortgage which A assigned to T. Afterward W reconveyed to A taking an indemnity against said bond. A then conveyed to B covenanting for quiet enjoyment. B then conveyed to Hunt by quitclaim. T thereupon foreclosed his mortgage and on the sale Hunt became the purchaser in order to save his lands from being sacrificed. Hunt then sued Amidon *in assumpsit*. Amidon was principal debtor on his bond.

Held: Decree and sale in foreclosure amounted to an eviction and the money paid by Hunt should be regarded as a payment by coercion of legal process, for the use and benefit of Amidon.

Where one standing in a position of a surety, whether he became such by contract or operation of law, is compelled to pay the debt which his principal in equity and justice ought to have paid, the latter is liable for the amount in an action for money paid.

Hunt v. Amidon, 4 Hill 345 (N. Y.) (1842).

Plaintiff, as Receiver of an insolvent corporation, levied an assessment against defendant for unpaid stock subscriptions, to recover same as assets of the corporation. Defendant pleaded the Statute of Limitations.

Held: "The original subscription for stock in the certificate of organization was liable to be paid immediately and as soon as a call for the same was made. At the directors' meeting held February 6th, 1903, a call for forty per cent. of the amount subscribed to the stock was authorized; this amount then became due and payable and left sixty per cent. subject to be called when required. When this was needed to pay creditors and a call for that purpose was made, it then became due and payable, and the statute of limitations began to run from the time of such call.

"It could not be considered as payable until the creditors' claim had been established and it had been ascertained that the corporation had no assets outside of its stock subscriptions to pay that debt."

Judgment for plaintiff affirmed.

McCarter, Rec'r v. Ketcham, 72 N. J. Law 247, 253 (1905).

Plaintiff conveyed land to defendant upon a verbal agreement to pay $350.00. At time of delivery of deed $150 only was paid. Suit at law was brought to recover the balance.

Held: "The error of the trial judge was in failing to observe the distinction between an express contract and an implied contract." The property having been conveyed to the defendant, the plaintiff's action was not upon the express contract of sale which was objected to because in parol, but upon the debt which arose upon the conveyance. "Nor do we see any difficulty in holding that the debt implied from the conveyance is the purchase price agreed upon."

Murray v. Schuldt, 73 N. J. Law 489 (1906).

Complainant was life tenant of certain land under the will of her husband. There was a mortgage of $1,000 on the land, and, on demand of the

mortgagee, she paid it, and through inadvertence she had it canceled of record. The land later being taken by a municipality in condemnation, the award was paid into Chancery, and the life tenant petitioned for payment to her of the amount formerly paid by her in satisfying the mortgage.

Held: "The complainant, being interested in the premises as life tenant, and being obliged to pay the mortgage in order to protect her life estate, was clearly entitled, upon such payment, to be subrogated to the rights of the holder of the mortgage. In fact she became the beneficial holder by virtue of the payment. * * * The right of the widow is to so much of the money * * * as represents the amount which was due upon the mortgage at the death of the testator. * * * Twenty years have not elapsed since she made the payment and there was no occasion for her to sooner assert her rights."

Kocher v. Kocher, 56 N. J. Eq. 545 (1898).

Assessments had been made by defendant for municipal improvements, and were paid by plaintiffs, in some instances more than six years before the suit was commenced. Later, and within the six year period, they were set aside, and upon reassessment the amounts were materially reduced. Plaintiffs sued at law for the difference between the original and the reduced assessments. Defendant pleaded the Statute of Limitations.

Held: "The statute of limitations is so clear upon this point, that I do not see how any reasonable doubt can arise, for its language is that the designated actions 'shall be commenced and sued within six years next after the causes of such actions shall have accrued, and not after.' In the application, therefore, of this provision, all we have to do is to inquire, in the particular case, when the right to sue arose, for until that event, the statutory

limitation is inoperative. And in the present instance, but one reply can be given to such an inquiry, for by the decisions of this court, it has been settled that no right of action existed in these plaintiffs with respect to the moneys in controversy, until after the vacation of the assessments by force of which such moneys had been paid.

"It was the setting aside of the assessments that gave the plaintiffs their cause of action, and consequently such right could not be barred until the running of six years after that act."

Mayor, etc., of Jersey City v. Green, 42 N. J. Law 627 (1880).

Suit was brought in 1880 by the District of Columbia to recover from the Metropolitan Railroad Company moneys alleged to have been expended in the years 1871-1875 in paving certain streets in Washington, upon the failure of the railroad company to do such work in accordance with its charter duty.

Held: The action was barred by the statute of limitations, requiring suits to be commenced "within three years ensuing the cause of action."

"It is an action on the case upon an implied *assumpsit* arising out of the defendant's breach of a duty imposed by statute, and the required performance of that duty by the plaintiff in consequence. This raised an implied obligation on the part of the defendant to reimburse and pay to the plaintiff the moneys expended in that behalf. The action is founded on this implied obligation, and not on the statute, and is really an action of *assumpsit*. * * * The action is clearly one of those described in the statute of limitations."

Met. R. R. Co. v. Dist. of Col., 132 U. S. 1; 33 L. Ed. 231 (1889).

A bill of exchange drawn on Daniel not having been paid, was protested. The maker and acceptor thereafter in 1819 paid the Bank of U. S. $3,330.67 on account of the aggregate amount supposed to be due, which included 10% damages and gave a promissory note for $8,000 for the balance, which was indorsed and discounted. The note was paid in part only, and later the Bank sued all parties and recovered judgment. In 1827 defendants in the judgment filed a bill to restrain the enforcement of the judgment, on the ground that it was erroneous to include the 10% damages in the amount due. The injunction was granted in the Court below. On appeal it was:

Held: "The cause of action to recover the money (had it been well founded) accrued at the time the mistaken payment was made, which could have been rectified in equity, or the money recovered back by a suit at law. * * *

"Payment was, therefore, made on the 8th of July, 1819, and the thousand dollars could have been sued for then as well as in 1827, when the bill of injunction was filed. It follows the act of limitations is a bar to the appellees, aside from any other ground of defense."

Bank of U. S. v. Daniel, 12 Peters (U. S.) 32; 9 L. Ed. 989 (1838).

Defendant in 1879 contracted to perform certain services respecting the steamer *Butte* owned by plaintiff, and made a contract with the owners of the steamer *McLeod* to do the towing of the *Butte*. Through the negligence of the defendant the *Butte* slipped back into the water and collided with the *McLeod*. The owners of the *McLeod* libeled the *Butte* and in 1883 recovered damages, which plaintiff was obliged to pay. Plaintiff thereupon brought suit against defendant to recover back

what he had been obliged to pay the *McLeod's* owners. Defendant pleaded the Statute of Limitations.

Held: That the right of the plaintiff to sue defendants for indemnity for the money which he was compelled to pay did not accrue, nor did the statute of limitations begin to run, until the payment was made.

"When the *Butte* collided with the *McLeod*, the sinking of the latter did not cause injury to the property or property rights of the owners of the *Butte*. No ground then existed for awarding damages, substantial or nominal to the owners of the *Butte*, as against Weaver & Co., for the sinking of the *McLeod*. *Whether the sinking of the McLeod would ever be a cause of damage to the owners of the Butte depended upon a contingency; that is, upon another event, to wit, whether they would be called upon to make good the damages caused to the McLeod. If they were not so called upon, then the alleged negligence of Weaver & Co., which produced the collision, and destruction of the McLeod, would not cause damage to the owners of the Butte; but, if they were compelled to make good the loss caused by the sinking of the McLeod, then, and not till then, could it be said that the negligence of Weaver & Co. in causing the destruction of the McLeod had resulted in damage to the owners of the Butte.* * * *

"The right to sue for indemnity for the money which the plaintiff was compelled to pay did not accrue until payment had been made, and, necessarily, the statute of limitations did not begin to run until the right to sue therefor had accrued."

Power v. Munger, 52 Fed. Rep. 705 (1892), 8th Cir.

See also,

37 Corpus Juris, p. 860, Sec. 225, *et seq.*;

43 Am. Dig. (Cent. Ed.) Cols. 544 &c., Secs. 307, &c.;

14 2nd Decennial Ed., pp. 1418-1420, Secs. 56-56 (4).

An executor paid to a legatee more money than the legatee was entitled to. This was discovered more than six years after, upon the settlement of his account in the Orphans' Court. He then sued the legatee to recover the amount so overpaid.

Held: The cause of action accrued when the payment was made, and the claim was therefore barred by the statute of limitations.

Ely v. Norton, 6 N. J. Law 187 (1822).

One partner made certain payments of interest, &c., to prevent if possible foreclosure of prior mortgages on property of partnership debtors, while engaged in foreclosing subsequent mortgages held by the partnership as security for the debts. Those payments were made more than six years prior to the commencement of this suit at law against the executor of the other partner to enforce contribution. Defendant pleaded the Statute of Limitations.

Held: Statute of Limitations was not a bar.

"In order, as it is claimed, to save the real estate upon which the Best mortgages were second liens, the items of interest on the prior mortgage were paid by the surviving partner, not in the character of a surety for a principal debtor, but rather in that of a part owner of property who incurs expenses which were necessary and reasonable in order to preserve such property. As to the expenses of foreclosing the mortgages it is plain that they partake of the same character, as they were incurred in the effort to preserve, or in other words, to obtain payment of the partnership debt or some portion thereof. Whether any

contribution directly from defendants would ever be necessary, could not be told at least until the termination of the foreclosure by the sale thereunder. In making those proper disbursements in the course of a foreclosure suit that are called for by the exigencies of the litigation, a cause of action for contribution does not at once arise against the estate of the deceased partner for the immediate repayment of a proportionate amount of each disbursement thus made. Nor does such cause of action arise at the moment of each payment of interest on the prior mortgage. Both the interest on the prior mortgage and the costs and expenses of the foreclosure of the Best mortgages were nothing but the general cost incurred by the surviving partner in the course of his attempt to collect the Ezra Fitch debt due the partnership estate and were necessary, as it is claimed, to protect the real estate from being sold under the prior mortgage. *At the termination of the litigation over these mortgages and upon the sale of the real estate, the true condition of the affairs between the parties could be arrived at, and for the first time it could be determined whether the moneys realized from the mortgages and other sources would be sufficient to reimburse the plaintiff for the advances made in the effort to recover payment of the debt due the partnership.* Within six years of that time this action was commenced."

Preston v. Fitch, 137 N. Y. 41, at 54 (1893).

In *Ellsworth* v. *C. R. R. Co.,* 34 N. J. Law 93, at 96, in a suit to recover damages for failure to maintain suitable farm crossing, the Court said:

> "The plaintiff was limited in her recovery to the damages sustained at the time the suit was commenced, which was about three years after the date of the deed, and it is impossible to conceive that the damages were estimated upon any correct legal principle."

In *Brewster* v. *Sussex R. R. Co.,* 40 N. J. Law 57, which was a suit for damages for the destruction of a right of way of plaintiff to a lot of land in which she had a life estate, the Court said:

> "On the trial below, the jury were directed to assess, as damages, 'just as much as they thought the life estate was lessened in value by reason of having the access to the land cut off.'
>
> "In this there was error. Judgments refer to the situation of the parties at the commencement of the suit, and, as a general rule, damages are allowed in personal actions only to that date."

In *Albey* v. *Weingart,* 71 N. J. Law 92, at 95, which was an action to recover damages for breach of a valid parol lease, the Court said:

> "The defendant requested the trial court to charge: 'That no damages except those actually suffered at the time the suit was instituted could be recovered in this suit.'
>
> "The court refused so to charge, and in that respect there was error in law. * * *
>
> "The plaintiff recovered full damages for his alleged loss by reason of being without a house until April 1st, 1904.
>
> "It was not shown and could not be shown that he could not have procured a suitable house between the time of commencing his suit and the 1st of April, 1904."

In *Church of Holy Communion* v. *Paterson, &c. R. R. Co.,* 66 N. J. Law 218 (E. & Ap., 1901), action for damages was commenced in 1887 by the church against the railroad company for alleged injury to a retaining wall built along the church property near the railroad tracks, caused by the vibration of passing trains. A previous settlement had been made in 1882 for damage resulting from the original excavation. It was contended by the railroad that full compensation for all damage had

been made by the settlement of 1882, and that the Statute of Limitations had run against plaintiff's claim.

Held: That the settlement of 1882 did not include the subsequent damage resulting from the operation of the trains, and that the Statute of Limitations had not run.

At page 226 of the report, Mr. Justice DEPUE, speaking for the Court of Errors and Appeals, said:

> "The wall did not become the property of the plaintiffs; it was a part of a retaining wall, extending beyond the church property a considerable distance in both directions. *No action could have been maintained by the plaintiffs to recover damages by reason of its defective construction until damage actually occurred.* For neither negligence, nor fraud, nor other wrong or immoral conduct or intent, will give rise to a cause of action unless it has resulted in illegal damage. *1 Encycl. L. & Pro. 667.* It is a fundamental principle of law, *applicable alike to breaches of contracts and to torts, that, in order to found a right of action, there must be a wrongful act done and a loss resulting from that wrongful act. Warwick* v. *Hutchinson,* 16 Vroom 61. The injury sustained by reason of the defective construction of the wall, as it was located, was a continuing injury. It is quite clear that if a suit had been brought in 1882, the plaintiffs could not have recovered in such a suit for the damages which would be sustained in 1887. *It would have been impossible at that time to have anticipated the future deterioration in the wall and the damages arising therefrom, and to have made an estimate of the amount thereof as the basis of computation. Compensation in such a suit must be sought after the damages are sustained. Brewster* v. *Sussex Railroad Co.,* 11 *id.* 57. *In such cases the cause of action depends upon the actual damage, and the statute of limitations begins to run from the time when such damage is sustained.*"

In *Wolcott* v. *Mount,* 36 N. J. Law 262, aff. 38 *id.* 496, a case precisely in point as between the vendor and immediate vendee, Mr. Justice DEPUE, speaking for the Supreme Court, at page 272 of the report, said:

> "The cardinal principle in relation to the damages to be compensated for on the breach of a contract, *that the plaintiff must establish the quantum of his loss, by evidence from which the jury will be able to estimate the extent of his injury,* will exclude all such elements of injury as are incapable of being ascertained by the usual rules of evidence to a reasonable degree of certainty."

See also,

> *8 Am. & Eng. Enc. of L.* (2 ed.), pp. 548, 560, 608, 609, and cases cited.

> "One seeking a recovery in damages must show by proof both his right to recover and the measure or extent of the loss by the injury for which he demands compensation. DICKINSON, J., in *Fairchild* v. *Rogers,* 32 Minn. 269." (Cited at p. 548.)

> "The general rule on this subject is that damages which are uncertain, *contingent,* or speculative are not recoverable." (Quoted from p. 608.)

> *"In order that there may be a recovery by a plaintiff* for a violation or invasion of his rights, there must be a *coincidence or concurrence of injury and damage."* (Quoted from p. 560.)

See also,

> *1 Am. & Eng. Enc. of L.* (1 ed.), p. 180, and cases cited, where it is stated that:

> "The right of action must be complete before action brought and the subsequent occurrence of a material fact will not avail in maintaining the action."

The citation of illustrative cases and authorities might be multiplied, but we feel that those referred to are sufficient to establish the principle for which plaintiff contends, viz.: That until it had been compelled to pay the judgment recovered against it by the sub-vendee, it had not sustained legal damage which would entitle it to prevail in a suit against the present defendant, nor was it in a position to prove the amount of damage which it had or might sustain; and that any action so brought by it would have been held to be prematurely brought prior to a final adjudication holding it liable to the sub-vendee and the determination of the amount of that liability. And it follows that the Statute of Limitations would not begin to run against plaintiff's claim against defendant until the situation had reached a stage which would permit it to commence its action, for it is not open to dispute, we think, that both the cause of action asserted by a plaintiff, and the *actio vel non* asserted by a defendant, alike relate back to the time of the commencement of the suit.

> *Titus* v. *Gunn*, 69 N. J. Law 410, 412 (Ct. E. & Ap., 1903);
> *1 Corpus Juris.* 1149.

Defendant cannot assert surprise or harm by the lapse of time, because it was notified of both the claim and the suit of the sub-vendee, but refused to defend either.

III.

So far as Counts 5 and 6 are concerned, it is clear that no right to seek repayment by the Painter Company from the Kil-Tone Company accrued, either for money paid and expended for defendant's use or *aequo et bono,* until the Painter Company had actually paid the judgment recovered against it by Peters; and the obligation on the part of the Kil-Tone Company to repay the Painter Company was fixed at that time. The statute of limitations therefore began to run against the Painter Company's right to reimbursement from the Kil-Tone Company, only from the time of such payment to Peters by the Painter Company. That was made in May, 1922, and hence the statute had not run at the time of the institution of the present suit in June, 1925.

IV.

It is respectfully submitted, therefore, that the judgment of nonsuit of the Supreme Court under review should be reversed, set aside and for nothing holden, and the record remitted for further proceedings in the Court below.

WALL, HAIGHT, CAREY & HARTPENCE,
Of Counsel with Plaintiff-Appellant.

APPEAL PRINTING CO., 22 THAMES ST., NEW YORK CITY
[8837]

NEW JERSEY COURT OF ERRORS
AND APPEALS.

THE E. O. PAINTER FERTILIZER CO.,
Plaintiff-Appellant,
v.
THE KIL-TONE COMPANY,
Defendant-Respondent.

ACTION AT LAW.

ON APPEAL FROM NEW JERSEY SUPREME COURT.

BRIEF FOR DEFENDANT-RESPONDENT.

At the October Term, 1926, plaintiff applied to the Supreme Court for an order striking out those portions of the answer filed by defendant which set up as defenses the statute of limitations and *res adjudicata.*

The Supreme Court declined to entertain this motion and referred the matter to the Circuit Court Judge. (5 *N. J. Adv. Rep.* 609).

Subsequently the motion was renewed before Circuit Court Judge Sooy, whose conclusions are to be found on page 35 of the State of the Case.

He sustained the defense of the statute of limitations, to which plaintiff excepted, and over-ruled the defense of *res adjudicata,* to which defendant excepted (p. 41).

The case was afterwards notice for trial, and a jury being waived, the Court non-suited the plaintiff on the opening.

Defendant respectfully insists that the non-suit was right, and that the resultant judgment should be affirmed.

I.

ACTION IS BARRED BY THE STATUTE OF LIMITATIONS.

Plaintiff claims, in the complaint filed, that in 1913 it purchased from defendant a quantity of insecticide upon a representation that such insecticide "would prevent plant disease, kill and destroy all insects and vermin infesting the same, act as a preventative of plant disease and as a tonic and stimulant to tomato plants," and that in January, 1914, the insecticide, when applied by a customer of plaintiff to his tomato plants, proved injurious instead of beneficial.

The foundation of the action is the alleged breach of warranty or the alleged misrepresentation made at the time of the sale of the insecticide, and the cause of action arose either when the sale was made or, at the latest, when the alleged damage was done to the tomato plants. In other words, the cause of action accrued at the time when the contract was broken, or at least when the breach of the contract became known to the plaintiff.

Suit, therefore, might have been brought in 1913, when the sale was made, or in 1914, when the crop was damaged, if it was so damaged.

This suit was brought June 23, 1925, more than eleven years after the cause of action arose.

Plaintiff argues that the cause of action did not arise until its customer recovered judgment against it in 1922, in a suit instituted in 1916, but a reading of the complaint clearly discloses that the foundation of the action is the alleged breach of the implied warranty of fitness in the sale of the insecticide.

The New Jersey Statute (3 C. S. of N. J. 3162) provides that

> "All actions * * * founded upon any * * * contract without specialty * * * shall be commenced and sued within six years next after the cause of such actions shall have accrued, and not after."

In *Bettley v. Falkner,* 3 Barn. & Ald. 288, it is said:

> "The declaration stated, that in consideration that plaintiff would buy of defendants a certain quantity of spring wheat for seed; the defendants undertook, that the same should be spring wheat. Breach, that the wheat was not of that description; but, on the contrary, was, at the time of the sale, winter wheat. It then stated, as special damage, that the plaintiffs had sold the wheat to one Shepard as spring wheat, and that he had caused it to be sown as such wheat in the spring of the year 1810, and that the wheat became and was unproductive, and would not ripen or bring crops to maturity in that year, whereby Shepard lost the use of

his land. It then stated, that an action was brought by Shepard against the plaintiffs, in the Court of Session in Scotland, for the damage sustained by him, in consequence of the wheat not being spring wheat, and that he recovered damages and costs. Plea, first, general issue; secondly, that the cause of action did not accrue within six years. At the trial before Abbott, C. J., at the London sittings after last Trinity term, it appeared on the statement of the plaintiff's counsel, that in the early part of the year 1810, the plaintiffs, who reside in Scotland, bought the wheat in question of the defendants, as spring wheat, and sold it as such to one Shepard, who having sown his land with it, and having discovered, in the autumn, that it was almost wholly unproductive, gave notice to the plaintiffs, that he considered them responsible to him for the loss of his crop from the lands where it was sown. The plaintiffs communiciated this to the defendants; and, after Shepard had commenced proceedings in the Scotch court against them, in June, 1811, gave the defendants notice that he had done so, and was about to assess damages against them. Nothing more passed between the parties till the beginning of the year 1818, when the suit in Scotland being then completed, the plaintiffs paid Shepard his damages and costs, and commenced the present action against defendants, to recover such damages and costs as special damage, resulting from the breach of the warranty. The Chief Justice, on this statement, which was agreed to on both sides, asked if there was any promise to take the case out of the statute of limitations; and being answered in the negative, non-suited the plaintiffs. In the last term, Scarlett obtained a rule to show cause why the non-suit should not be set aside, and a new trial had."

The non-suit was sustained and separate opinions delivered by four Judges. One of the opinions, in part, is as follows:

> "Best, J. It appears to me that the terms of the statute are extremely clear and unambiguous. It says, that the action must be brought within six years after the cause of action, and not after. The only question, therefore, is, when the cause of action accrued; for the statute then attached. I think that the cause of action accrued the moment the defendant failed to perform that which he agreed to do. Now he contracted to sell wheat of a particular quality, and the wheat is, in fact, of a different quality. The cause of action was therefore complete, and the statute began to operate from the time of the delivery of the wheat."

The following cited authorities support the proposition that the cause of action accrued at the time of the sale of the insecticide and not at the date of the recovery of the judgment against plaintiff by its customer:

> "The typical warranty, being an undertaking regarding the quality of goods at the time of their sale, must, if ever broken, be broken at that time; and the statute of limitations, therefore, begins to run immediately. On the other hand, if the seller promises that something shall happen or shall not happen to the goods within a specified future time, the promise, though it

may be called a warranty, cannot be broken until that time has elapsed, and until then the statute will not begin to run."

Williston on Sales, 2nd Ed., Sections 212, 212a.

In *Gogolin v. Williams,* 91 N. J. L. 266 (E. & A.), it was held that the statute began to run from the occurrence of the breach of legal duty and not from the time of the discovery of the error and the accruing of the damage.

Among other authorities, the Court cited 13 *A. & E. Ann. Cas.* 696; 25 *Cyc.* 1083-1116; and 17 *R. C. L.* 76.

In *Aacken & Munich Fire Insurance Co. v. Morton,* 156 Fed. Rep. 654 (C. C. A. 6th Circuit), it was held:

"If an act occur, whether it be a breach of contract or duty which one owes another or the happening of a wrong, whether wilful or negligent, by which one sustains an injury, however slight, for which the law gives a remedy, that starts the statute. That nominal damages would be recoverable for the breach or for the wrong is enough. The fact that the actual or substantial damages were not discovered or did not occur until later is of no consequence. The act itself, which is the ground of action cannot be legally separated from its consequence. Were this not so, successive actions might be brought in many cases of contract and tort as the damages developed, although all the consequential injuries had one common root in the single, original breach or wrong. This would in effect nullify the statute."

In 15 *L. R. A.* (N. S.) at page 156, there is an elaborate note to the opinion in *Aachen v. Morton,* where it is said, among other things:

"It is conceded by practically all the authorities that in cases of breach of contract the statute of limitations begins to run against the right of the person damaged to recover, from the time of the breach, and not from the time actual damages are sustained in consequence thereof."

"Where unsound articles are sold with a warranty of soundness, or where goods are warranted to be of certain kind or quality, and they are not of that kind or quality, the warranty is broken as soon as made; and the statute of limitations commences to run against an action for the breach thereof from that time, and not from the time when the buyer sustains consequential damages." (p. 162).

In *Gregory v. Underhill,* 6 Lea (Tenn.) 207, it was held that:

"Representation that trees are early harvest apple trees constitutes a warranty that the trees are of a character represented, and are of such quality that they may be relied upon to bear fruit, and the words are not sufficient to show that a future warranty is intended to the effect that the trees will bear early harvest apples; hence, the warranty is broken upon delivery of trees which do not meet the requirements thereof, and a cause of action then accrues in favor of the buyer for the breach, and the statute of limitations runs against this cause of action from that date."

See 16 *A. L. R.* 897.

"A cause of action on contract, whether for damages or otherwise, commences to run from the time of the breach, whether the facts are known to the party having the right, or not, and if the latter, whether through ignorance, neglect or mistake of such party, or fraud of his adversary. There is no exception." (Citing numerous authorities.)

Ott v. Hood, 152 Wis. 907; 139 N. W. 762; 44 L. R. A. (N. S.) 524.

This action was first brought in the United States District Court for the District of New Jersey in 1923, and judgment was entered against the plaintiff in that Court (See State of Case, p. 17).

In disposing of the case, Judge Bodine said (p. 30):

"The plaintiff's right of recovery arose by reason of a breach of warranty made at the time the sale was consummated. The warranty was not that the seller would indemnify the buyer in the event that a judgment was recovered against him, but that the goods were either merchantable and fit for resale or fit for the disclosed purpose of the plaintiff's sub-buyer. The breach of either warranty occurred more than six years before the present action was commenced and the statute of limitations runs from the breach of the warranty, though no damages occur until later. The plaintiff in the present suit, even before the sub-buyer recovered damages from him, could have brought his suit and could have recovered as damages an amount measured by his probable liability to his sub-buyer."

The law of the forum controls the application of the statute.

Jaqui v. Benjamin, 80 N. J. L. 10.

See also

Wilcox v. Plummer, 29 U. S. 172 (L. Ed. 7, p. 821), approving *Bettley v. Falkner (supra);*
25 *Cyc.* 1091-1092;
17 *R. C. L.* 125;
Woodland Oil Co. v. Byers, 223 Pa. 241 (72 Atl. 519);
37 *C. J.* 835, 836.

All which support the proposition that in a case of this character the statute begins to run from the date of sale and not from the time the buyer sustains consequential damages.

II.

THE JUDGMENT ENTERED IN THE UNITED STATES DISTRICT COURT IS RES ADJUDICATA.

Defendant pleads in bar the former judgment in the United States District Court for the District of New Jersey, between the same parties, for the same cause of action.

The proceedings in the former suit are set out in the State of the Case, beginning at page 17, and there cannot be any doubt that the parties are the same and that the two suits are for the same cause of action. The *ex aequo et bono* counts in the present complaint do not add anything except language to the cause of action as set out in the complaint in the former suit.

Judge Rellstab signed an order in the suit in the Federal Court that the complaint be struck out on the ground that the cause of action was barred by the statute of limitations.

This was a final judgment from which an appeal could have been taken to the Circuit Court of Appeals.

No such appeal was taken.

The following authorities are cited in support of the proposition that the judgment of the Federal Court is final and conclusive between the parties to the present suit.

> "In my judgment, nothing is better settled, as a principle of jurisprudence, than that the judgment of a court of competent jurisdiction, on a point of law or a question of fact, or on a question of blended law and fact, does, so long as it remains unreversed, have the effect, as between the parties and those standing in privity with them, to put the question or matted adjudged at rest finally and forever and for all purposes."
>
> *Paterson v. Baker,* 51 N. J. E. 49.

In *McMichael v. Horay,* 90 N. J. L. 142 (E. & A.), it was said by Chancellor Walker:

> "The judgment of a Court having jurisdiction of the parties and the subject-matter of the suit is conclusive, not only as to the *res* of that case, but as to all further litigation between the same parties touching the same subject-matter, though the *res* itself may be different."

This was not a judgment of non-suit for failure to state a cause of action but was on a motion to strike because the cause of action was barred by the statute of limitations. The Court so held.

The present suit is for precisely the same cause of action and the former judgment that this cause of action is barred by the statute is conclusive and binding upon the plaintiff.

> "This doctrine of *res adjudicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect."
>
> *Hart Steel Co. v. Railroad Supply Co.,* 244 U. S. 294.

And in *Southern Pacific R. R. Co. v. United States,* 168 U. S. 1 (at p. 45), Mr. Justice Harlan said:

> "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settle-

ment of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

In *Bragg v. King,* 6 *N. J. Adv. Rep.* 191, *at* 193, Mr. Chief Justice Gummere said:

"The doctrine of *res adjudicata,* as defined by our Court of Errors and Appeals, is that the judgment of a court of competent jurisdiction on a question of law or fact, when litigated and determined, is, so long as it remains unreversed, conclusive upon the parties and their privies, not only in the suit in which it is pronounced, but in all future litigation between the same parties or their privies, touching upon the same subject-mater. In re *Walsh's Estate,* 80 *N. J. Eq.* 565."

In *Northern Pacific R. Co. v. Slaght,* 205 U. S. 122, it was held that,

"It is well established that a judgment on demurrer is as conclusive as one rendered upon proof."

By reference to the record in the Federal Court printed in the State of the Case, it will be observed that (p. 27) there was a stipulation entered to the effect that the motion to strike the complaint, based on the statute of limitations, should be argued as if made before the filing of answer, instead of at the hearing of the cause.

This is equivalent to a demurrer, and the consequent judgment was final and appealable.

The present judgment is sustainable on either or both of the grounds above stated.

We respectfully submit that the judgment below should be affirmed.

May Term, 1928.

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HERBERT C. BARTLETT,
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