

St. John's Law Review

Volume 29
Number 1 *Volume 29, December 1954, Number*
1

Article 5

Statutes of Limitation in the Sales Transaction

St. John's Law Review

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

NOTES

STATUTES OF LIMITATION IN THE SALES TRANSACTION

The multiplicity of legal duties arising out of the modern interplay of free economic forces frequently places an injured party in the enviable position of having more than one possible remedy against his adversary. This is especially so in those situations where the parties assume a dual or plural relationship toward one another. A common example occurs in the usual sales transaction. The vendor there assumes liability for any injury that may befall the purchaser through his negligence in preparing or storing the goods sold. In addition, he is potentially liable for a breach of warranty should the article in question be deficient. This may be either an express promise on the part of the supplier, or the implied warranties of merchantability¹ or fitness for use² which the law imposes. It is not unusual, therefore, to find causes of action in negligence and warranty joined and tried together.³

Despite the similarities between them, however, the two grounds of action stem from widely dissimilar sources,⁴ with the consequence that major procedural and substantive differences separate them. Not the least of the marks which keep them distinct is the variance in the law of limitations applicable to each.⁵ It is the purpose of this note

¹ N.Y. PERS. PROP. LAW § 96(2).

² *Id.* § 96(1).

³ See, e.g., *McGrath v. Helena Rubinstein, Inc.*, 29 F. Supp. 822 (S.D.N.Y. 1939); *Pearlman v. Garrod Shoe Co.*, 276 N.Y. 172, 11 N.E.2d 718 (1937); *Great American Indemnity Co. v. Lapp Insulator Co.*, 282 App. Div. 545, 125 N.Y.S.2d 147 (4th Dep't 1953); *Gile v. Sears, Roebuck & Co.*, 281 App. Div. 95, 120 N.Y.S.2d 258 (3d Dep't 1952).

⁴ Actions on express warranty were originally tort actions in deceit. See Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 8 (1888). In the eighteenth century, however, the action of assumpsit was allowed for such warranties. See 1 WILLISTON, SALES 504 (Rev. ed. 1948). Beginning in 1815, the English courts began to imply warranties of quality in certain situations, which eventually came to embrace substantially the same categories now covered in UNIFORM SALES ACT § 15. This section was taken nearly verbatim from the English Sale of Goods Act, which codified the common law. See 1 WILLISTON, SALES 582 *et seq.* (Rev. ed. 1948). Liability in negligence by a vendor or other contracting party, on the other hand, has always been recognized as a distinct ground for action, even in the absence of express warranty. See POLLOCK, TORTS 335 (15th ed. 1951). Of course, the plaintiff could not be compensated twice for the same facts. *Ibid.*

⁵ For a discussion of the general problem see PRASHKER, NEW YORK PRACTICE §§ 27A, 27B (3d ed. 1954).

to deal with the limitation peculiarities of each of the two causes of action, indicating both the proper period to apply and the characteristic method of measuring the limitation.

Negligence

In any discussion of negligence in the vendor-vendee situation, the starting point must be the case of *MacPherson v. Buick Motor Co.*⁶ It will be recalled that that decision was the vehicle wherein one of our State's most eminent jurists laid down with finality a rule of law which had evolved over several decades, *i.e.*, that the supplier of a defective article is liable to any person injured thereby, where ". . . the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made. . . ." ⁷ Originally no such rule could have existed, since the law was conceived to be that a supplier owed a duty of care only to those in privity of contract with him.⁸ At the same time, parties not in privity were allowed to recover in tort, but only in those instances where the defendant had negligently supplied an article which, by its nature, was inherently dangerous to life and limb.⁹ By extending the remedy to anyone injured by a negligently constructed article, the *MacPherson* case apparently jettisoned the contractual element in the concept of the duty owed, which had been the underlying rationale of the earlier decisions.

In cases of the *MacPherson* variety, despite the contractual background of the situation, there does not appear to be any question but that the tort limitation period is applicable.¹⁰ A problem, the solution of which is uncertain, however, is that of when the applicable limitation commences to run. The general rule, repeatedly stated by courts and legislators, is that statutes of limitation commence to run from the time that a cause of action accrues.¹¹ It is the general rule

⁶ 217 N.Y. 382, 111 N.E. 1050 (1916) (per Cardozo, J.).

⁷ *Id.* at 389, 111 N.E. at 1053. See also *Genesee County Patrons Fire Relief Ass'n v. L. Sonneborn Sons, Inc.*, 263 N.Y. 463, 189 N.E. 551 (1934), where the rule was extended to apply to property damage cases. The *MacPherson* rule was applied to one who supplies a defective article to a lessee in *La Rocca v. Farrington*, 301 N.Y. 247, 93 N.E.2d 829 (1950), 25 St. JOHN'S L. REV. 390 (1951).

⁸ *Losee v. Clute*, 51 N.Y. 494 (1873); *Loop v. Litchfield*, 42 N.Y. 351 (1870); *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

⁹ *Thomas v. Winchester*, 6 N.Y. 396 (1852). See 4 SHERMAN AND REDFIELD, NEGLIGENCE 1571 *et seq.* (Rev. ed. 1941).

¹⁰ *McGrath v. Helena Rubinstein, Inc.*, 29 F. Supp. 822 (S.D.N.Y. 1939).

¹¹ See *Maguire v. Hibernia Savings & Loan Soc'y*, 23 Cal.2d 719, 146 P.2d 673, 680 (1944); *State ex rel. McClure v. Northrop*, 93 Conn. 558, 106 Atl. 504, 506 (1919); *Grant v. Williams*, 158 Neb. 107, 62 N.W.2d 532, 536 (1954); *R. J. Reynolds Tobacco Co. v. Carson*, 187 Tenn. 157, 213 S.W.2d 45, 51

that the cause of action in a contract action accrues immediately upon the occurrence of a breach.¹² Much more rare is a statement defining just when, in a negligence action, that event takes place. In negligence cases the cause of action is usually held to accrue upon the happening of a legal injury.¹³ The latter is so even though at the time of the injury no substantial damages are inflicted,¹⁴ or, having been inflicted, their true extent cannot at that time be appreciated.¹⁵

A particularly vexing problem is found in those cases where a considerable period of time elapses between the consummation of the wrongful act and the occurrence of any legal harm to the plaintiff. If the period of limitation in such situations were to run from the time of the wrongful act, the plaintiff might find, in extreme cases, that his remedy was barred before he was injured. If, on the other hand, it were not to begin to run until the injury were to occur, the tortfeasor might be forced to submit to potential liability for an extraordinary period of time.¹⁶ If periods of limitation are to be measured

(1948). For legislative employment of this terminology, see statutes cited in footnote 22 *infra*.

¹² See *Bykowsky v. Public National Bank*, 209 App. Div. 61, 204 N.Y. Supp. 385 (1st Dep't 1924), *aff'd mem.*, 240 N.Y. 555, 148 N.E. 702 (1925); *Ahrens v. Guaranty Trust Co.*, 125 Misc. 443, 211 N.Y. Supp. 283 (App. T. 1st Dep't 1925); *Reynolds Metals Co. v. McCrea*, 99 A.2d 84 (D.C. 1953); see *Crawford v. Duncan*, 61 Cal. App. 647, 215 Pac. 573, 574 (1923).

¹³ See, e.g., *Finck v. Albers Super Markets, Inc.*, 136 F.2d 191 (6th Cir. 1943); *Di Gironimo v. American Seed Co.*, 96 F. Supp. 795 (E.D. Pa. 1951); *Gile v. Sears, Roebuck & Co.*, 281 App. Div. 95, 120 N.Y.S.2d 258 (3d Dep't 1952). The setting in motion of forces which eventually produce injury does not start the period running until the injury actually occurs. See *Pollock v. Pittsburgh, B. & L.E.R.R.*, 275 Pa. 467, 119 Atl. 547 (1923).

¹⁴ *Schmidt v. Merchants Despatch Trans. Co.*, 270 N.Y. 287, 200 N.E. 824 (1936). This is one of a host of cases involving the general factual pattern wherein a servant inhales deleterious matter while working, and discovers several years after leaving the master's employ that a silicotic lung condition has developed. Since the real injury in such cases is not inflicted by the dust itself, but by the secondary results which occur some years later, the statute of limitations may have run before any substantial damage has been sustained. See, e.g., *Michalek v. United States Gypsum Co.*, 76 F.2d 115 (2d Cir. 1935), *rev'd*, 298 U.S. 639 (1936); *Brown v. Tennessee Consol. Coal Co.*, 19 Tenn. App. 123, 83 S.W.2d 568 (1935); *Scott v. Rinehart & Dennis Co.*, 116 W. Va. 319, 180 S.E. 276 (1935).

¹⁵ *Kennedy v. Johns-Mansville Sales Corp.*, 135 Conn. 176, 62 A.2d 771 (1948) (negligent injury to property); cf. *Industrial Chrome Plating Co. v. North*, 175 Ore. 351, 153 P.2d 835 (1944); see *City of Miami v. Brooks*, — Fla. —, 70 So.2d 306, 308 (1954). The amount of the damages, of course, may be affected by developments which occur subsequently. See *Gardner v. Beck*, 195 Iowa 62, 189 N.W. 962 (1922).

¹⁶ The German and Swiss Codes attempt to cope with the problem by employing two periods of limitation, a long period which runs from the time of the injury, and a short period which runs from the discovery of the injury. See *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1178 (1950).

from the date that a cause of action accrues, logic would seem to demand that no period should run until there has been an injury received, for, patently, a plaintiff cannot have a cause of action for a wrong he has not yet suffered. If the remedy has not yet come into existence it cannot be barred.¹⁷

These elemental conclusions were called into question in 1952 by the United States Court of Appeals, Second Circuit, in the case of *Dincher v. Marlin Firearms Co.*,¹⁸ a case similar in principle and facts to the *MacPherson* case. In the *Dincher* case the court was called upon to interpret a Connecticut negligence limitation statute, which barred the bringing of an action after one year ". . . from the date of the act or omission complained of. . . ." ¹⁹ On the facts, more than a year had passed since the defective article was supplied, but less than a year had elapsed since the injury. The court, reasoning that the "act or omission complained of" must have happened no later than the date when the defendant parted with the defective goods, held that the statute of limitations began to run at that time, and the plaintiff's remedy was consequently barred.²⁰ In dissenting, Judge Frank pointedly called attention to the illogic of the majority opinion, which purported to bar a remedy which had never existed. The absurdity of the opinion is underlined by the fact that the plaintiff, prior to his injury, had no cause of action at all, since he lacked privity of contract with the defendant. He could not have even recovered the price of the defective article. To attribute such a stultifying intent to the Connecticut legislature was unnecessary, Judge Frank explained, since the history of the act in question indicates that the words "act or omission" were intended to mean "injury or neglect," and so the period should not be computed from the date of sale, but from the date of the injury.²¹

An analysis of the various statutes of limitation presently in force in the United States discloses that the Connecticut statute involved in the *Dincher* case is unique. The majority of jurisdictions forestall complications by providing in their statutes that the limitation period shall run from the time when the cause of action accrues,²²

¹⁷ See the statement by Vaughan Williams, L.J., in *Thomson v. Lord Clanmorris*, [1900] 1 Ch. 718, 728-729 (C.A.), that "[a] Statute of Limitations cannot begin to run unless there are two things present—a party capable of suing and a party liable to be sued."

¹⁸ 198 F.2d 821 (2d Cir. 1952).

¹⁹ CONN. GEN. STAT. § 8324 (1949).

²⁰ The *Dincher* case is not alone in holding that a negligence action may be barred before it accrues. See *Hooper v. Carr Lumber Co.*, 215 N.C. 308, 1 S.E.2d 818 (1939). The *Hooper* case has never been followed, and the case of *Mobley v. Murray County*, 178 Ga. 388, 173 S.E. 680 (1934), upon which it rests, is an action for money had and received, and, in the author's opinion, is not in point at all.

²¹ 198 F.2d 821, 823 *et seq.* (2d Cir. 1952) (dissenting opinion).

²² ALA. CODE tit. 7, §§ 18, 26 (1940); ALASKA COMP. LAWS ANN. tit. 55,

or words of similar import,²³ while the remainder (excepting Connecticut) leave the question open for judicial interpretation.²⁴

In view of the unusual statute involved in the *Dincher* case, coupled with the unfortunate interpretation given to it, it is unlikely that a substantial body of law will grow from that decision. To forestall any more hard cases, however, it is to be hoped that Connecticut will modify her limitation statute so as to bring it into harmony with those of her sister states.

Breach of Implied Warranty

In New York,²⁵ as in other jurisdictions,²⁶ certain statutory warranties are implied automatically in every sale of goods. These implied warranties contain elements of both tort and contract,²⁷ and in consequence, complete unanimity has not always prevailed among the states concerning which limitation period is applicable in an action for damages arising from their breach.²⁸ In New York, where the

§ 55-2-1 (1949); ARIZ. CODE ANN. § 29-202 (1939); ARK. STAT. § 37-206 (1947); CAL. CODE CIV. PROC. § 312 (1953); COLO. STAT. ANN. c. 102, § 1 (1935); ILL. REV. STAT. c. 83, § 15 (1951); IND. STAT. ANN. § 2-602 (Burns, Supp. 1953); IOWA CODE c. 614, § 614.1 (1950); KAN. GEN. STAT. ANN. § 60-306 (1949); KY. REV. STAT. ANN. § 413.140 (Baldwin, 1943); ME. REV. STAT. c. 99, § 90 (1944); MD. CODE ANN. art. 57, § 1 (Flack, 1951); MASS. LAWS ANN. c. 260, § 4 (1933); MICH. COMP. LAWS § 609.13(2) (1948); MINN. STAT. §§ 541.01, 541.05 (1949); MISS. CODE ANN. § 722 (1942); MO. REV. STAT. §§ 516.100, 516.120 (1949); NEB. REV. STAT. §§ 25-204, 25-207 (1943); N.H. REV. LAWS c. 385, § 3 (1942); N.J. REV. STAT. tit. 2, § 2:24-2 (1937); N.M. STAT. ANN. §§ 27-101, 27-107 (1941); N.Y. CIV. PRAC. ACT § 49(6); N.D. REV. CODE § 28-0116 (1943); OKLA. STAT. tit. 12, § 95 (1951); ORE. REV. STAT. c. 12, §§ 12.010, 12.110 (1953); PA. STAT. ANN. tit. 12, § 51 (Purdon, 1953); R.I. GEN. LAWS c. 510, § 1 (1938); S.D. CODE § 33.0232 (1939); TENN. CODE ANN. § 8595 (Williams, 1934); TEX. CIV. STAT. art. 5526 (Vernon, 1948); UTAH CODE ANN. tit. 78, §§ 78-12-1, 78-12-25 (1953); VT. STAT. § 1689 (1947); VA. CODE ANN. tit. 8, § 8-24 (1950); WASH. REV. CODE tit. 4, §§ 4.16.010, 4.16.080 (1951); W. VA. CODE ANN. § 5404 (1949); WIS. STAT. §§ 330.14, 330.19 (1953); WYO. COMP. STAT. ANN. §§ 3-503, 3-506 (1945).

²³ DEL. CODE ANN. tit. 10, § 8118 (1953); D.C. CODE tit. 12, § 201 (1951); GA. CODE ANN. tit. 3, § 3-1004 (1933); OHIO REV. CODE ANN. tit. 23, § 2305.10 (Baldwin, 1953).

²⁴ FLA. STAT. § 95.11 (1951); IDAHO CODE tit. 5, §§ 5-214, 5-219 (1948); LA. STAT. ANN. CIV. CODE art. 3536 (1952); MONT. REV. CODE c. 26, §§ 93-2601, 93-2605 (1947); NEV. COMP. LAWS § 8524 (Hillyer, 1929); N.C. GEN. STAT. ANN. §§ 1-46, 1-52 (Michie, 1953); S.C. CODE tit. 10, §§ 10-141, 10-143 (1952).

²⁵ N.Y. PERS. PROP. LAW § 96.

²⁶ See UNIFORM SALES ACT § 15. The Sales Act has been adopted in thirty-four states, Alaska, Hawaii, and the District of Columbia.

²⁷ See *Buyers v. Buffalo Paint & Specialties Co.*, 199 Misc. 764, 774, 99 N.Y.S.2d 713, 723 (Sup. Ct. 1950). See 1 WILLISTON, SALES 502 (Rev. ed. 1948).

²⁸ Compare *Schlick v. New York Dugan Bros., Inc.*, 175 Misc. 182, 22 N.Y.S.2d 238 (N.Y. City Ct. 1940), and *Seymour v. Union News Co.*, 349

tort limitation was applied in the past to the breach of implied warranty situation,²⁹ it has now been definitely settled that the contract limitation is properly applicable.³⁰ This position is consistent with the greater weight given to the contractual element in actions for breach of implied warranty. In suits grounded upon this theory, there must exist privity of contract between the parties for the action to be maintainable.³¹ This is, of course, basically different from the holding in the *MacPherson* case, according to which, as previously noted, no privity at all need exist between the parties.³²

Warranties, generally speaking, may be either prospective or present in nature.³³ A prospective warranty, which refers to a future event, is not breached until the defect in the goods becomes known to the buyer. Perhaps the most common example occurs in those cases where a vendor sells seeds or seedlings, and warrants that they will bear a particular type of fruit. In such a case the warranty is not breached until the defect is or should have been discovered, that is, when the plant matures.³⁴ This being the case, the cause of action accrues and the statute of limitations begins to run at that time.³⁵ Other fact situations involving prospective warranties adopt the same

Ill. App. 197, 110 N.E.2d 475 (1953) (tort period applied), *with* Southern California Enterprises, Inc. v. D. N. & E. Walter & Co., 78 Cal. App.2d 750, 178 P.2d 785 (1947) (by implication), and *Challis v. Hartloff*, 136 Kan. 823, 18 P.2d 199 (1933) (contract period applied). One very simple way of avoiding such problems is to have the same limitation period for tort and contract, as do the English. 2 & 3 GEO. 6, c. 21, Part I, § 2(1a) (1939).

²⁹ *Buyers v. Buffalo Paint & Specialties Co.*, *supra* note 27; *Schlick v. New York Dugan Bros., Inc.*, *supra* note 28.

³⁰ *Blessington v. McCrory Stores Corp.*, 305 N.Y. 140, 111 N.E.2d 421 (1953), 28 ST. JOHN'S L. REV. 127. *Accord*, *Drooby v. Collins*, 281 App. Div. 733, 117 N.Y.S.2d 905 (3d Dep't 1952). The *Blessington* case has been followed in an action for property damage. See *Great American Indemnity Co. v. Lapp Insulator Co.*, 282 App. Div. 545, 125 N.Y.S.2d 147 (4th Dep't 1953).

³¹ *Gimenez v. Great A. & P. Tea Co.*, 264 N.Y. 390, 191 N.E. 27 (1934); *Turner v. Edison Storage Battery Co.*, 248 N.Y. 73, 161 N.E. 423 (1928); *Chysky v. Drake Bros. Co.*, 235 N.Y. 468, 139 N.E. 576 (1923).

³² There has been a hint that the strict requirement of privity will not be with us much longer in breach of implied warranty, however. See *Pearlman v. Garrod Shoe Co.*, 276 N.Y. 172, 177, 11 N.E.2d 718, 719 (1937). The proposed Uniform Commercial Code, if New York adopts it, will abolish the privity requirement as to those members of the vendee's family who may be reasonably expected to use the goods. UNIFORM COMMERCIAL CODE § 2-318 (1952); see *Fagan, Sales and Security Law*, 26 ST. JOHN'S L. REV. 72, 80 (1951).

³³ See 1 WILLISTON, SALES 548 (Rev. ed. 1948).

³⁴ *Burge v. Albany Nurseries, Inc.*, 176 Cal. 313, 168 Pac. 343 (1917); *Sherer v. Park Nursery Co.*, 103 Cal. 415, 37 Pac. 412 (1894).

³⁵ *Woodworth v. Rice Bros. Co.*, 110 Misc. 158, 179 N.Y. Supp. 722 (Sup. Ct.), *aff'd mem.*, 193 App. Div. 971, 184 N.Y. Supp. 958 (4th Dep't 1920), *aff'd mem.*, 233 N.Y. 577, 135 N.E. 925 (1922); *Firth v. Richter*, 49 Cal. App. 545, 196 Pac. 277 (1920); *Ingalls v. Angell*, 76 Wash. 692, 137 Pac. 309 (1913). *But cf.* *Allen v. Todd*, 6 Lans. 222 (N.Y. Gen. T. 4th Dep't 1872).

principle, so that no limitation period runs against the vendee until the faultiness of the merchandise supplied becomes known (or should have become known) to him.³⁶

While this principle is clear where the prospective warranty is involved, there appears to be a divergence of judicial opinion when confronted with implied warranties which are present in nature. In such situations, the courts of New York measure the limitation period from the time that the goods are sold by the vendor, that is, when the warranty is breached.³⁷ This is in line with the general contract rule that the statute of limitations runs from the time of the breach.³⁸ The New York rule, of course, involves the same problem which was noted earlier in respect to certain negligence situations, *i.e.*, that the plaintiff's limitation period may have run out before he has suffered any substantial damage.³⁹ To avoid this harsh and often inequitable result, some courts have simply construed express warranties, which were present on their face, as in reality prospective, where this would seem to be the intent of the parties.⁴⁰ Still other courts, all federal, have held that the cause of action for breach of a present warranty accrues when the defect is discovered.⁴¹ Actually, the majority view seems to be that the statute begins to run from the date of delivery of the goods,⁴² a position which lies somewhere between those of the New York and the federal courts.

³⁶ *Woodward-Wight & Co. v. Engel Land & Lumber Co.*, 123 La. 1093, 49 So. 719 (1909); *Felt v. Reynold's Fruit Evap. Co.*, 52 Mich. 602, 18 N.W. 378 (1884) (machine sold with warranty that it would operate *when tested*); *Heath v. Moncrieff Furnace Co.*, 200 N.C. 377, 156 S.E. 920 (1931) (heating plant warranted to heat building *when installed*); see *Cunningham v. Frontier Lumber Co.*, 245 S.W. 270 (Tex. Civ. App. 1922) (roofing material warranted to give satisfactory service).

³⁷ See *Liberty Mutual Ins. Co. v. Sheila-Lynn, Inc.*, 185 Misc. 689, 57 N.Y.S.2d 707 (App. T. 1st Dep't 1945), *aff'd mem.*, 270 App. Div. 835, 61 N.Y.S.2d 373 (1st Dep't 1946).

³⁸ *Wechsler v. Bowman*, 285 N.Y. 284, 34 N.E.2d 322 (1941); see *Baron v. Kurn*, 349 Mo. 1202, 164 S.W.2d 310 (1942); *cf. Singleton v. Lewis*, 3 Ky. 265 (1808).

³⁹ This difficulty was recognized by the court in the *Liberty Mutual Ins. Co.* case, *supra* note 37 at 693, 57 N.Y.S.2d at 710, but no solution is there offered.

⁴⁰ See note 35 *supra*. In all these cases the warranty was express, but there seems to be no valid reason why the same interpretation cannot be given to an implied warranty where the situation demands it. This was, in fact, suggested in *Liberty Mutual Ins. Co. v. Sheila-Lynn, Inc.*, *supra* note 37 at 695-696, 57 N.Y.S.2d at 713 (concurring opinion).

⁴¹ See, *e.g.*, *John S. Sills & Sons, Inc. v. Bridgeton Condensed Milk Co.*, 43 F.2d 72 (3d Cir. 1930); *P. H. Sheehy Co. v. Eastern Importing & Mfg. Co.*, 44 App. D.C. 107, L.R.A. 1916F 810 (1915); see *New Amsterdam Casualty Co. v. Baker*, 74 F. Supp. 809, 811 (D. Md. 1947). *Contra*: *Poole v. Terminix Co., Inc.*, 200 F.2d 746 (D.C. Cir. 1952); *Foley Corp. v. Dove*, 101 A.2d 841 (D.C. 1954).

⁴² See, *e.g.*, *Painter Fertilizer Co. v. Kil-Tone Co.*, 105 N.J.L. 109, 143 Atl. 332 (1928); *Woodland Oil Co. v. A. M. Byers & Co.*, 223 Pa. 241, 72 Atl. 518 (1909); *Battley v. Faulkner*, 3 B. & Ald. 288, 106 Eng. Rep. 668 (1820).

No matter which view is adopted, the plaintiff is nonsuited if the period of limitation has run out, regardless of whether or not his damages are as yet ascertainable,⁴³ just as in the negligence situation earlier discussed.

The conflicting demands made by plaintiff and defendant of the courts and legislatures in ascertaining the limitation of a particular action lend emphasis to a moral problem in the law. While the one party is entitled to that peace of mind which comes with the knowledge that ancient adverse claims have been laid to rest, the other is, in common justice, entitled to a remedy *after* he knows that he is injured, and what his injuries are. In this latter respect there are deficiencies in the law in both of the grounds of action here discussed. Opinions such as that in the *Dincher* case not only fail to achieve substantial justice, but tend to bring the law into disrepute among laymen. While the law is more sensibly interpreted in the breach of implied warranty situation, the plaintiff, in New York, might still find that he has not any practical remedy. As long as such a condition prevails, it cannot be said that an adequate form of justice is being afforded to injured vendees by the courts in this State.



GORDON V. ELLIMAN—A FURTHER INROAD UPON THE RIGHTS OF MINORITY STOCKHOLDERS

Rights of Shareholders

It is now well settled that a corporation is an entity separate and distinct from the members that comprise it.¹ It is capable of owning property in its name,² making its own contracts,³ and may sue or be sued in its own right. But being an "entity," recognizable only in law, it is necessary that it act through the agency of the members that comprise it. The law, therefore, has provided that the management of a corporation shall be in the board of directors,⁴ and the stock-

⁴³ *New Amsterdam Casualty Co. v. Baker*, *supra* note 41.

¹ *See* *Warrior River Terminal Co. v. State*, 257 Ala. 208, 58 So.2d 100, 101 (1952); *Corporation Comm'n v. Consolidated Stage Co.*, 63 Ariz. 257, 161 P.2d 110, 111 (1945); *Miller v. McColgan*, 17 Cal.2d 432, 110 P.2d 419, 421 (1941).

² *See* *Corporation Comm'n v. Consolidated Stage Co.*, *supra* note 1; *Miller v. McColgan*, *supra* note 1; *Button v. Hoffman*, 61 Wis. 20, 20 N.W. 667, 668-669 (1884).

³ *See* *Bank of Augusta v. Earle*, 13 Pet. 519, 587 (U.S. 1839).

⁴ N.Y. GEN. CORP. LAW § 27. "The business of a corporation shall be managed by its board of directors. . . ."