

The Statute of Limitations Versus Trust Accountings

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they even went to trial. Then again, it may be said that juries and courts may have difficulty in applying such a rule. This appears to be a lame excuse for a reluctance to make a justified innovation. Every law, of necessity, must have a beginning. Usually, beginnings are tedious. The conquering of difficulties results in success. It is submitted, therefore, that if justice is sought, the recommendations suggested herein be considered.



THE STATUTE OF LIMITATIONS VERSUS TRUST ACCOUNTINGS

Introduction

The "Achilles' heel" of a seemingly perfect case is often a statute of limitations. No amount of learned and persuasive argument can prevail in the face of a bar to the action raised by an applicable statute of limitations. While the statutes themselves are aimed at the accomplishment of impartial justice, since their effect is so devastating upon a bona fide cause of action, the rules governing their applicability and operation should be consistent and clearly defined. With regard to those causes of action which are cognizable only at law it can be said that the requirement of clarity has been generally fulfilled. On the other hand, the operation of a statute of limitations upon actions within the sphere of equity's jurisdiction is fraught with uncertainty and, in many instances, defies prediction. Nowhere within the broad scope of equity's influence is the unpredictability and confusion as to the operation of the statute of limitations more apparent than in the field of trust relationships.

The specific problems to be dealt with herein were chosen for discussion from the many existing problems merely because they serve as the best examples of trust relationships in general. References will be made throughout to the "legal statute of limitations" and to the "equitable statute." The former refers to the applicable statutes in the Civil Practice Act,¹ which cover most legal causes of action, while the latter has reference to Section 53 of the Civil Practice Act.²

Concurrent Jurisdiction

Where there is concurrent jurisdiction in law and equity over the subject matter involved, the applicable legal statute of limitations

¹ N. Y. CIV. PRAC. ACT §§ 48, 49, 50, 51-a.

² *Id.* § 53.

will control.³ The courts look to the substance of the action rather than its form in determining which statute applies. Thus, although the action for an accounting is solely within the jurisdiction of equity the fact that a substantially, different type of action is thus denominated is not determinative of the controlling statute of limitations.⁴ Accordingly, where the plaintiff sued her stockbrokers in equity, for an accounting of moneys paid to them for investment purposes, the court declared plaintiff's action to be, in substance, one to recover money, and, as such, barred by the six-year legal statute of limitations which ran from the time a demand for return of the money had been made.⁵ Again, in the case of *Mills v. Mills*,⁶ where the defendant-mortgagee after the foreclosure sale held the surplus money adversely to the heirs of the mortgagor, the latter's action in equity for an accounting was barred by the six-year legal statute of limitations, the court holding their action essentially one for money had and received.⁷ Therefore, it is apparent that neither the device of entitling the action "for an accounting," nor labelling the defendant "constructive trustee" will prevent the legal statute of limitations from being invoked where the suit, in essence, is based on a legal cause of action.

However, when the plaintiff bases his cause of action on a theory cognizable only in equity, the equity statute of limitations is applicable.⁸ Thus, in an action to impress a trust upon property in the hands of a third person, on the theory of a constructive fraud,⁹ the ten-year equity statute of limitations applies, and commences to run from the time the wrong, upon which the charge is based, was committed. A good illustration is *Geller v. Schulman*,¹⁰ where the plaintiffs sued their step-father for specific performance of a promise, made by him to their mother, that he would transfer a one-half interest in an estate, held by them as tenants by the entirety, to her children

³ See *Keys v. Leopold*, 241 N. Y. 189, 193, 149 N. E. 828, 829 (1925); *Minion v. Warner*, 238 N. Y. 413, 418, 144 N. E. 665, 666 (1924).

⁴ *Keys v. Leopold*, *supra* note 3; *Mills v. Mills*, 115 N. Y. 80, 21 N. E. 714 (1889); see *Cohen v. Hughes*, 291 N. Y. 698, 52 N. E. 2d 591 (1943).

⁵ *Keys v. Leopold*, *supra* note 3. Here there was no express trust and it was doubtful if there was even a constructive trust. *Id.* at 192, 149 N. E. at 829.

⁶ 115 N. Y. 80, 21 N. E. 714 (1889).

⁷ See N. Y. CIV. PRAC. ACT § 48 (no demand necessary to start statute running).

⁸ *Id.* § 53. See PRASHKER, *NEW YORK PRACTICE* § 28 (2d ed. 1951).

⁹ A cause of action based on *actual fraud*, express or implied, is controlled by the six-year statute of limitations which runs from the date the fraud is discovered. See *Emmerich v. City Bank Farmers Trust Co.*, 300 N. Y. 417, 91 N. E. 2d 868 (1950); *Nasaba Corp. v. Harfred Realty Corp.*, 287 N. Y. 290, 39 N. E. 243 (1942) (*constructive fraud* here and the ten-year statute applied).

¹⁰ 110 N. Y. S. 2d 862 (Sup. Ct. 1951), *aff'd mem.*, 280 App. Div. 933, 115 N. Y. S. 2d 824 (2d Dep't 1952); see also *Buttles v. Smith*, 281 N. Y. 226, 236, 22 N. E. 2d 350, 353 (1939).

(plaintiffs here) upon her death. In order to avoid the consequences of the statute of frauds it was imperative that the plaintiffs show that the defendant's refusal to convey amounted to a *constructive* fraud thus providing equity with a basis for impressing a trust. Without actually deciding that a constructive trust existed, the court recognized that the gravamen of plaintiffs' suit was purely equitable and thus applied the ten-year statute of limitations.¹¹

Express Trusts

The rule regarding express trusts seems simple enough when viewed generally. No statute of limitations can run against the beneficiaries' right to compel an accounting from the trustee as long as the trust continues to exist.¹² This rule is based on the reasoning that during the existence of the trust relationship this cause of action accrues from time to time.¹³ A qualification to the general rule, however, may be gleaned from the cases and by analogy to the operation of the rule of laches.¹⁴ The qualification is that if the trustee *repudiates* the trust relationship, the statute of limitations¹⁵ will commence to run against the right to enforce the trust from the time the beneficiary acquires, or should have acquired, knowledge of the repudiation.¹⁶ Thus, although technically we cannot say that a repudiation

¹¹ The ten-year statute of limitations runs from the time the wrong was committed by the party being charged. See *Lammer v. Stoddard*, 103 N. Y. 672, 673, 9 N. E. 328, 329 (1886); *Spallholz v. Sheldon*, 158 App. Div. 367, 371, 143 N. Y. Supp. 417, 419 (3d Dep't 1913); *Geller v. Schulman*, *supra* note 10, at 865. *Contra*: *Jud Whitehead Heater Co. v. Abler*, 111 Cal. App. 2d 861, 245 P. 2d 608 (1952); *Dabney v. Philleo*, 38 Cal. 2d 60, 237 P. 2d 648 (1951) (Cal. equity statute only 3 years).

¹² See *Ward v. Smith*, 3 Sandf. 592 (N. Y. 1846); *Kane v. Bloodgood*, 7 Johns. Ch. 90 (N. Y. 1823); *Decouche v. Savetier*, 3 Johns. Ch. 190 (N. Y. 1817); 2 SCOTT, TRUSTS § 219.1 (1939). For similar recognition of continuing rights, see CLARK, PRINCIPLES OF EQUITY § 317 (1948); WALSH, EQUITY § 102 (1930).

¹³ The statement that the statute of limitations does not run against the right of the beneficiary of an express trust to compel an accounting does not mean that no statute will bar his recovery for breaches of trust committed by the trustee, to his knowledge, more than ten years before. The statute of limitations may very well have run against the beneficiary's right to surcharge the trustee for a breach of trust. See BOGERT, TRUSTS 707 (3d ed. 1952). But this does not mean that the beneficiary cannot demand an accounting from the trustee in order to ascertain exactly to what extent he is barred from recovery. See *Matter of Ashheim*, 111 App. Div. 176, 97 N. Y. Supp. 607 (1st Dep't), *aff'd mem.*, 185 N. Y. 609, 78 N. E. 1099 (1906); *Matter of Irvin*, 68 App. Div. 158, 74 N. Y. Supp. 443 (1st Dep't 1902).

¹⁴ 2 SCOTT, TRUSTS § 219.1 (1939).

¹⁵ N. Y. CIV. PRAC. ACT § 53.

¹⁶ See *Lammer v. Stoddard*, 103 N. Y. 672, 673, 9 N. E. 328, 329 (1886); *Matter of Ashheim*, *supra* note 13, at 177, 97 N. Y. Supp. at 608; *Matter of Carpenter*, 184 Misc. 162, 166, 52 N. Y. S. 2d 377, 382 (Surr. Ct. 1944), *modified*, 277 App. Div. 71, 63 N. Y. S. 2d 736 (3d Dep't 1946), *aff'd*, 297

ends the trust relationship, nevertheless, for the purpose of the statute of limitations, a repudiation by the trustee will prevent the beneficiary from relying further on the fiduciary's integrity, and his action against the trustee must be brought within the prescribed period. However, if the beneficiary is an infant, or under any other disability¹⁷ at the time he learns of the repudiation, the statute will, in all probability, be tolled until the disability is removed.¹⁸

The above rules govern where the trust has not yet run its natural course. What happens when the trust does come to a natural termination? An example will best serve to illustrate the situation. *A* devises property, in trust, to *T* who is to apply the income to the use of *B* until *B* attains 35 years of age or sooner dies; thereafter *T* is to pay over the entire estate to *B*. Upon *B*'s thirty-fifth birthday *T* fails to turn over the property to *B*. Does the statute of limitations then start to run against *B*'s action to compel an accounting and payment to him of the principal? A strict application of the rules usually governing the operation of the statute¹⁹ would produce an affirmative answer, but there is some authority to the contrary.²⁰ Reasoning that the trust continues until the final act is done, *i.e.*, payment over, or until a repudiation by the trustee, some authorities advance the proposition that a mere failure to pay over at the termination of an express trust is not such a repudiation as will start the statute in motion.²¹ A further extrapolation of this problem will be considered later with respect to the rights of remaindermen since the problem there is closely analogous to the present one.

N. Y. 498, 74 N. E. 2d 194 (1947); *Matter of Griffin*, 170 Misc. 496, 10 N. Y. S. 2d 161, 162 (Surr. Ct. 1939); *Hitchcock v. Peaslee*, 89 Hun 506, 510 (N. Y. 1895); see 2 SCOTT, TRUSTS §219.1 (1939). There must be such a repudiation of the trust as will apprise the beneficiary of the fact that the trustee no longer holds the property as such but now claims the estate adversely. See BOGERT, TRUSTS 708 (3d ed. 1952).

¹⁷ N. Y. CIV. PRAC. ACT §§ 43, 60.

¹⁸ 2 SCOTT, TRUSTS §219.3 (1939); BOGERT, TRUSTS 712 (3d ed. 1952).

¹⁹ A strict application of the statute would be based on the reasoning that since the trust has come to an end and the beneficiary is now entitled to the corpus in the hands of the trustee, the statute starts to run from this point against an action to compel the trustee to deliver it. See *Gilmore v. Ham*, 142 N. Y. 1, 10, 36 N. E. 826, 829 (1894); *Emmerich v. City Bank Farmers Trust Co.*, 85 N. Y. S. 2d 840 (Sup. Ct. 1948), *aff'd mem.*, 275 App. Div. 1026, 89 N. Y. S. 2d 895 (1st Dep't), *rev'd on other grounds*, 300 N. Y. 417, 91 N. E. 2d 868 (1950); N. Y. CIV. PRAC. ACT §15(1).

²⁰ Most of the cases which advance this proposition involve executors, administrators or guardians, who are not strictly "trustees." See *Mitchell v. Mitchell*, 170 App. Div. 452, 156 N. Y. Supp. 76 (1st Dep't 1915); *Matter of Anderson*, 122 App. Div. 453, 106 N. Y. Supp. 818 (2d Dep't 1907); *Matter of Ashheim*, 111 App. Div. 176, 97 N. Y. Supp. 607 (1st Dep't), *aff'd mem.*, 185 N. Y. 609, 78 N. E. 1099 (1906); *Matter of Walls*, 179 Misc. 924, 38 N. Y. S. 2d 879 (Surr. Ct. 1942).

²¹ See note 20 *supra*.

Remainder Interests

The position of the remainderman of an express trust in relation to the trustee and life-taker, insofar as the statute of limitations is concerned, is virtually unexplored by the courts. A cursory review of the interests of the remainderman entitled to the corpus of the trust will serve to elucidate the problems encountered in this area.

Although the relationship between the trustee and the remainderman is not the same as that of trustee and cestui que trust, the trustee does owe certain duties to the person entitled to the corpus upon the expiration of the preceding trust estate. He must exercise diligence in maintaining the property in good repair, in preventing waste and in keeping the principal intact,²² or be held liable to the remainderman, upon the expiration of the life estate, for any dissipation of the corpus which has occurred through his fault or neglect.²³ The Surrogate's Court Act²⁴ permits any person "interested" in the trust estate to compel the trustee to render an accounting. Both vested and contingent remaindermen have been held to be persons "interested" within the meaning of the statute.²⁵ Thus, the remainderman of an express trust may, even during the life of the first-taker, petition for an accounting and removal of the trustee. The right of a vested remainderman to bring such an action is concededly unconditional, but doubt has been expressed as to whether the contingent remainderman's right is likewise unconditional. There exists a group of cases in which it is alleged, by way of dicta, that a contingent remainderman's right to an accounting is conditioned upon his ability to indicate some specific act of mismanagement from which waste and dissipation may be inferred.²⁶ It is submitted that no valid reason exists for distinguishing between vested and contingent interests insofar as the right to compel an accounting is concerned.²⁷ Furthermore, the application of such a rule might well bring about an inequitable result as the logical consequence of rules applicable to the operation of the statute of limitations, as will hereinafter be indicated.

²² See *Matter of Straut*, 126 N. Y. 201, 213, 27 N. E. 259, 262 (1891); *Wright v. Miller*, 8 N. Y. 9, 27 (1853); *Matter of Welch*, 20 App. Div. 412, 414, 46 N. Y. Supp. 689, 690 (1st Dep't 1897), *aff'd mem.*, 154 N. Y. 774, 49 N. E. 1105 (1898).

²³ See BOGERT, TRUSTS cc. 10, 11 (3d ed. 1952); 2 SCOTT, TRUSTS §§ 167, 202, 205.

²⁴ N. Y. Surr. Ct. Act §§ 258, 259.

²⁵ *Klein v. Klein*, 64 N. Y. S. 2d 96 (Sup. Ct. 1946); *Matter of Olstein*, 51 N. Y. S. 2d 770 (Surr. Ct. 1944); see *Furniss v. Furniss*, 148 App. Div. 211, 215, 133 N. Y. Supp. 535, 538 (1st Dep't 1911); see 3 BOGERT, TRUSTS AND TRUSTEES § 522 (1951).

²⁶ See *Chipman v. Montgomery*, 63 N. Y. 221, 232 (1875); *Furniss v. Furniss*, *supra* note 25.

²⁷ See note 24 *supra*. The statute does not differentiate between vested or

Disregarding, for the moment, any purported distinction between contingent and vested remainders, it is apparent that a cause of action for compulsory accounting accrues to the remainderman during the life of the first-taker, even though he has no present right to the possession of the trust res.²⁸ Is it possible, then, that the statute of limitations will run against the remainderman's cause of action for accounting during the life tenant's life? Since there is apparently a right on the part of the remainderman to compel an accounting during the continuance of the express trust which accrues, as does that of the life-cestui, from time to time as long as the trust exists, no statute of limitations can run against this right until the trust relationship is terminated by natural expiration or repudiation by the trustee.²⁹

There is some confusion, however, as to whether any cause of action *ever* accrues to the remainderman during the life of the first-taker, so as to bring into play any consideration of the statute of limitations. Some authorities are of the opinion that no cause of action can accrue until the remainderman is entitled to immediate possession of the trust res, *e.g.*, upon the life-taker's death.³⁰ The case of *Putnam v. Lincoln Safe-Deposit Company*³¹ does not support this theory, although it has been cited as doing so.³² In that case the action was originally one by the remaindermen of an express trust against the life-taker for an accounting of the trust funds which she had wrongfully obtained from the trustee. The court considered the life tenant a trustee *de son tort*,³³ who, for the purpose of the statute of limitations, stands in the same position as an express trustee. During the pendency of this action the life-taker died and her executor was substituted as defendant. The court, reasoning that the action was *now* one to compel the payment of the trust corpus³⁴ to the re-

contingent remaindermen but merely bestows the right on all persons "interested."

²⁸ See notes 24 and 25 *supra*.

²⁹ See notes 12 and 13 *supra*.

³⁰ See *Matson v. Abbey*, 141 N. Y. 179, 183, 36 N. E. 11, 12 (1894); *Matter of Carpenter*, 184 Misc. 162, 166, 52 N. Y. S. 2d 377, 382 (Surr. Ct. 1944), *modified*, 277 App. Div. 71, 63 N. Y. S. 2d 736 (3d Dep't 1946), *aff'd*, 297 N. Y. 498, 74 N. E. 2d 194 (1947); *Hitchcock v. Peaslee*, 89 Hun 506, 510 (N. Y. 1895); *Gilbert v. Taylor*, 76 Hun 92, 97 (N. Y. 1894), *aff'd*, 148 N. Y. 293, 42 N. E. 713 (1896); see 2 SCOTT, TRUSTS § 219.4 (1939).

³¹ 49 Misc. 578, 100 N. Y. Supp. 101 (Sup. Ct. 1906), *modified*, 118 App. Div. 468, 104 N. Y. Supp. 4 (3d Dep't 1907), *rev'd on other grounds*, 191 N. Y. 166, 83 N. E. 789 (1908).

³² See *Hart v. Goadby*, 72 Misc. 232, 238, 129 N. Y. Supp. 892, 897 (Sup. Ct. 1911); see note 30 *supra*. But see 2 SCOTT, TRUSTS § 219.4 (1939).

³³ See *Putnam v. Lincoln Safe-Deposit Co.*, 49 Misc. 578, 100 N. Y. Supp. 101, 109 (Sup. Ct. 1906) (for subsequent history, see notes 34 and 35 *infra*). For a general discussion of the relationship of the trustee *de son tort* to the beneficiary, see *Easterly v. Barber*, 65 N. Y. 252, 259-61 (1875); 1 PERRY, TRUSTS § 245 (7th ed. 1929).

³⁴ See *Putnam v. Lincoln Safe-Deposit Co.*, 118 App. Div. 468, 475, 104 N. Y. Supp. 4, 9 (3d Dep't 1907).

remaindermen, held that such cause of action could not accrue until the death of the life tenant,³⁵ and therefore, the remaindermen were not barred by the statute of limitations.³⁶ Thus, it is clear that for all practical purposes the action here was to compel payment-over at the termination of the trust, and, as in the case of a remainderman's suit against a third party,³⁷ such cause of action could not accrue until he was entitled to possession of the property. Therefore, this case, although cited as such, is not authority for the proposition that a remainderman's cause of action to compel an *accounting* and *restitution* by the trustee cannot accrue until the life tenant's death. Nor can it be said that the case of *Woodbridge v. Bockes*³⁸ is authority for that proposition. In that case the plaintiff, life-taker of the trust, was barred from bringing her action for an accounting against the trustee because of her own misconduct in relation to the trust fund.³⁹ She then contended that she was bringing the action on behalf of the contingent remaindermen, who were her grandchildren. While the court held that she could not do indirectly that which her own wrong prevented her from doing directly, it expressly stated that an individual action by the contingent remaindermen⁴⁰ against the trustee and the life tenant was not prejudiced by this determination, even though twenty-two years had gone by since the misconduct by the trustee. Although the dicta here might seem to support the theory that no cause of action can accrue to the remainderman until his interest is possessory, it can be explained on at least three or four grounds: (1) the court may have been referring to an action by the remainderman after the life tenant's death to recover the corpus as in the *Putnam* case; (2) it does not appear that the acts of the trustee amounted to a repudiation, or that if they did, that the contingent remaindermen had knowledge thereof; (3) the remaindermen may very probably have been infants and thus under the protection of the disability statutes.⁴¹ In any event, there appears to be no persuasive authority to rebut the conclusion that a cause of action does accrue to the remainderman when he receives knowledge of a

³⁵ See *Putnam v. Lincoln Safe-Deposit Co.*, 191 N. Y. 166, 183, 83 N. E. 789, 794 (1908).

³⁶ The applicable statute of limitations would be N. Y. CIV. PRAC. ACT § 53 (10 years).

³⁷ The view in New York is that even though the life tenant or trustee is barred by a statute of limitations from his action against a third person interfering with the property, the remainderman cannot be barred until his right of entry accrues. See *Simis v. McElroy*, 160 N. Y. 156, 163, 54 N. E. 674, 675 (1899). *But cf.* *Johnson v. Cook*, 122 Ga. 524, 50 S. E. 367, 369 (1905); *Willson v. Louisville Trust Co.*, 102 Ky. 522, 44 S. W. 121, 122 (1898).

³⁸ 170 N. Y. 596, 63 N. E. 362 (1902).

³⁹ The misconduct of the plaintiff consisted of her interference with the trust fund with the result of a substantial dissipation.

⁴⁰ The contingent remaindermen to the trust were plaintiff's grandchildren.

⁴¹ See note 17 *supra*.

repudiation of the trust, and, therefore, the statute of limitations will commence to run against his right to enforce the trust at that time, even though he is not yet entitled to possession of the res.⁴²

Is a Contingent Remainderman's Right Conditional?

Consider the argument heretofore mentioned that a contingent remainderman's right to compel an accounting is conditional on his ability to show some act of mismanagement upon the trustee's part, in the light of the rule that no statute of limitations can commence to run against the life-taker or vested remainderman since their cause of action for a compulsory accounting continues as long as the trust relationship remains unrepuated.⁴³ In promulgating a rule which gives the contingent remainderman only a conditional right to maintain such an action, we might well reach the undesirable conclusion that a contingent remainderman's action for accounting could, under certain circumstances, be barred during the existence of the trust while the right of action of the life tenant and vested remainderman continued unimpeded.⁴⁴ If a contingent remainderman has a *conditional* rather than a continuing right to compel an accounting from the trustee during the existence of the preceding life estate, then his cause of action might accrue but once during this time, *i.e.*, upon his discovery of the commission of some act of mismanagement, and thus the statute of limitations would run from that time, barring the remainderman's right to enforce the trust ten years thereafter. Since the contingent remainderman, by the very nature of his interest, is not likely to exercise close control over the trustee, this result would be patently inequitable. There would appear to be no valid reason for drawing such a distinction between vested and contingent remaindermen's rights.

In the case of *Hitchcock v. Peaslee*,⁴⁵ the court adopts the theory that no statute can run against the right to compel an accounting dur-

⁴² ". . . [T]he doctrine applicable to trusts [is] that the statute does not run upon them until they are openly repudiated by the trustee." *Gilmore v. Ham*, 142 N. Y. 1, 9-10, 36 N. E. 826, 828 (1894). "He who pleads the statute is always taking advantage of his own wrong in the sense that it is invariably his own default, his neglect or wrongful act, which originates a cause of action against himself and so sets the Statute of Limitations running. The law does not intend to reward one or punish the other, but goes upon a broad ground of public policy which aims to end litigation within periods which are fair and just to both parties." *Id.* at 10-11, 36 N. E. at 829.

⁴³ See note 12 *supra*.

⁴⁴ Knowledge of some act of mismanagement by the trustee will not bar the beneficiary's right to enforce the trust ten years thereafter, although it may prevent his surcharging the trustee for the loss suffered because of that act. See note 13 *supra*. Thus, their right to compel an accounting is unaffected by the passage of time.

⁴⁵ 89 Hun 506 (N. Y. 1895).

ing the existence of the trust relationship except in the case of a repudiation and recognizes that a *contingent* remainderman, like other parties in interest, has a continuing right to compel the trustees to account. In this case the testator left his daughter \$20,000 which she was to invest and apply the income to her own use for life, and if she died without issue, the remainder of the principal to go to her mother⁴⁶ and brother. The daughter, life-taker and trustee, invested the money and it was promptly lost. She notified her mother and brother of the loss, and this action to compel the life-taker to restore the trust fund and account was brought by the brother twelve years later. The court dismissed the defense of the statute of limitations, reasoning that since petitioner's cause of action was merely to compel restitution of the trust principal, his right to maintain it continued as long as the life tenant was under a duty to hold the funds intact. Knowledge of merely one act of mismanagement, which did not evince an intention to hold adversely⁴⁷ to the remainderman, will not start the statute of limitations running as long as the trust relationship and its consequent duty to account continues. The decision in this case was cited with approval in *Matter of Carpenter*,⁴⁸ the court holding that the statute of limitations was not set in motion against a contingent remainderman's action for accounting merely because he was informed of a partial loss of the trust funds during the life tenant's life. The court in this case agreed with the reasoning in *Hitchcock v. Peaslee*,⁴⁹ that unless the remainderman acquires knowledge that the trustee is asserting an adverse claim to the fund or expressly repudiates the trust in some other manner, his right to compel an accounting continues and the statute of limitations does not begin to run.⁵⁰ A close reading of these two cases will serve to illustrate that the argument that the statute of limitations cannot bar the remainderman until his interest is a possessory one is not irreconcilable with the view that a cause of action may *accrue* to him during the existence of the life estate. The conflict in this area is more apparent than real, due to a large extent to the failure of the courts to distinguish between actions for accounting which continuously accrue during the existence of the life estate, and one which accrues but once, upon the termination of the trust, to the person entitled to the corpus. It is the latter cause which is referred to in the argument that the right of action cannot accrue until the death of the life tenant, while the former cause of action is unaffected by any statute of limitations, until the trust is repudiated, since it is continually accruing.

⁴⁶ The mother died prior to the bringing of the action and her interest vested in the daughter, the life-taker.

⁴⁷ *Hitchcock v. Peaslee*, *supra* note 45, at 511.

⁴⁸ 184 Misc. 162, 52 N. Y. S. 2d 377 (Surr. Ct. 1944), *modified*, 277 App. Div. 71, 63 N. Y. S. 2d 736 (3d Dep't 1946), *aff'd*, 297 N. Y. 498, 74 N. E. 2d 194 (1947).

⁴⁹ *Supra* note 45.

⁵⁰ *Matter of Carpenter*, *supra* note 48, at 166, 52 N. Y. S. 2d at 382.

Synthesis

Much of the confusion as to the operation of the statute of limitations with regard to express trusts can be alleviated by placing actions for accounting into three categories and distinguishing the effect of the statute upon each. The first of these categories constitutes the action of the cestui que trust to compel an accounting from the trustees merely to ascertain the fiscal condition of the estate with no suspicion of misconduct on the trustee's part. It is this cause of action which is continuously enforceable by the life beneficiary and remaindermen,⁵¹ as long as the trust relationship exists, and no statute of limitations can run against their right.

The second category comprises those accounting proceedings which have for their object the trustee's removal, an accounting and restitution of any of the principal that was dissipated due to his mismanagement. Those persons whose interest is in the remainder as well as those having the present interest may institute such a proceeding.⁵² Ordinarily the statute of limitations would have no applicability to this cause of action for the same reason that it does not affect the first category. In other words, a mere lapse of time after a breach of the trust, not amounting to a repudiation, will not bar the enforcement of the trust, since the beneficiary not only has a right to rely on the fiduciary relationship between himself and the trustee, but the trustee himself continues to recognize his liability to account and thus cannot claim hardship after the passage of time.⁵³ However, if the act of the trustee which is complained of amounts to a repudiation of the trust relationship, the above reasoning no longer applies⁵⁴ and the statute of limitations commences to run from the time the beneficiaries for life or the remaindermen acquire, or should have acquired, knowledge of the repudiation.

At the termination of an express trust we encounter the third category of actions for accounting. The person entitled to the corpus

⁵¹ See note 12 *supra*.

⁵² N. Y. SURRE. CT. ACT § 259. See also note 25 *supra*.

⁵³ The primary consideration underlying a statute of limitations is one of fairness to the defendant. *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950). The statute of limitations in equity is not applied with the same strictness as it is at law since equity has traditionally employed laches and under the doctrine of laches the hardship to the defendant is of primary importance. See 2 SCOTT, TRUSTS § 219 (1939).

⁵⁴ "As between the trustee and beneficiary, in the case of an express or direct trust, the statute of limitations has no application, unless the trustee has repudiated the trust and claims the trust estate adversely, and such repudiation and adverse claim have been brought to the knowledge of the cestui que trust, after the latter is sui juris, and the connection is so wholly at an end as to indicate that the cestui que trust is no longer controlled by the influence proceeding from the trustee, which existed during the continuance of the trust." BOGERT, TRUSTS 708 (3d ed. 1952).

of the trust fund upon the expiration of the prior estate is now vested with a cause of action to compel the trustee to account for, and to turn over to him, the trust assets. What was formerly a mere right of supervision has ripened into a possessory right. Does the statute of limitations now begin to run against the remainderman's right to enforce the trust? If so, which statute is applicable, the six-year legal⁵⁵ statute or equity's ten-year period?⁵⁶ It might be argued that since the beneficiary's cause of action, at this time, is essentially one to recover money or property, the six-year legal statute should govern.⁵⁷ On the other hand, since the right of enforcement stems from an *express* trust, the action may be said to be one to enforce a final duty of the trustee and thus strictly of equitable cognizance.⁵⁸ It is submitted that the latter view is the more acceptable of the two.

Even if we conclude that the equity statute of limitations⁵⁹ governs, a problem remains as to when it commences to run against the remainderman's action. Applying strictly the rules which generally control the operation of a statute of limitations, we should say that since the remainderman's cause of action accrued upon the death of the life tenant, the passage of ten years from that time will bar his recovery. There is, however, a tendency on the part of some courts not to allow a mere lapse of time⁶⁰ to bar an action against a fiduciary where the beneficiary has no knowledge of an intention on the part of the fiduciary to hold the fund adversely.⁶¹ It is submitted that the former view is better adapted to a statute of limitations, while the latter is a more suitable companion to the doctrine of laches.⁶²

⁵⁵ N. Y. CIV. PRAC. ACT § 48.

⁵⁶ *Id.* § 53.

⁵⁷ See *Matter of Deitz*, 134 Misc. 393, 235 N. Y. Supp. 756 (Surr. Ct. 1929) (executrix); *Matter of Van Derzee*, 73 Hun 532 (N. Y. 1893) (case deals with guardian-ward relationship). See also BOGERT, TRUSTS 710 (3d ed. 1952).

⁵⁸ For a discussion of the operation of Section 53 of the Civil Practice Act, see PRASHKER, NEW YORK PRACTICE § 28 (2d ed. 1951).

⁵⁹ See note 56 *supra*.

⁶⁰ See *Matter of Ashheim*, 111 App. Div. 176, 177, 97 N. Y. Supp. 607, 608 (1st Dep't), *aff'd mem.*, 185 N. Y. 609, 78 N. E. 1099 (1906); *Matter of Irvin*, 68 App. Div. 158, 162, 74 N. Y. Supp. 443, 447 (1st Dep't 1902).

⁶¹ See 2 SCOTT, TRUSTS § 219.2 (1939).

⁶² "Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay." *Chase Securities Corp. v. Donaldson*, 325 U. S. 304, 314 (1945). See also PRASHKER, NEW YORK PRACTICE § 24 (2d ed. 1951).

Conclusion

At this point it is apparent that virtually no situation involving the application of Section 53 of the Civil Practice Act is free from indecision and conflict. The enactment of a statute of limitations covering actions in equity and supplementing the traditional doctrine of laches has as its aim the establishment of uniformity and consequent predictability.⁶³ It is submitted that the legislature's failure to define adequately the boundaries of operation of Section 53 and its further delinquency in failing to indicate clearly the time when the statute will be set in motion, as it has done with regard to the "legal" statutes of limitation,⁶⁴ has resulted in greater disunity and unpredictability than had formerly existed when laches exercised exclusive control.



LIABILITY OF AN AGENT SIGNING A NEGOTIABLE INSTRUMENT IN NEW YORK

Introduction

The liability of an undisclosed principal is well settled under ordinary rules of agency.¹ However, the exception to this rule lies in the field of negotiable instruments.² No one may be charged on a negotiable instrument unless his name appears thereon.³ Nevertheless, one may lawfully authorize another to sign⁴ as maker, acceptor or indorser and this delegation of authority may be established as in other cases of agency.⁵ Therefore, it follows that such authority may

⁶³ The propriety of this aim has, nevertheless, been seriously questioned. See Finkelstein and Bergman, *Limitations of Actions in Equity in New York*, 5 ST. JOHN'S L. REV. 199, 211 (1931).

⁶⁴ See, e.g., N. Y. CIV. PRAC. ACT §§ 15, 48, 49.

¹ See *Kayton v. Barnett*, 116 N. Y. 625, 23 N. E. 24 (1889).

² See *New York Life Ins. Co. v. Martindale*, 75 Kan. 142, 88 Pac. 559 (1907).

³ NEGOTIABLE INSTRUMENTS LAW § 18; N. Y. NEG. INST. LAW § 37. "No person is liable on the instrument whose signature does not appear thereon But one who signs in a trade or assumed name will be liable to the same extent as if he had signed his own name."

⁴ N. Y. GEN. CONST. LAW § 46. "The term signature includes any memorandum, mark or sign, written, printed, stamped, photographed, engraved or otherwise placed upon any instrument or writing with intent to execute or authenticate such instrument or writing."

⁵ NEGOTIABLE INSTRUMENTS LAW § 19; N. Y. NEG. INST. LAW § 38.