

Statutory Limitation for Fraud Actions

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most zealous in its protection of the wife's marital rights. The husband may be compelled to answer not only to his wife, but to the state,⁵¹ and even to total strangers⁵² where he is remiss in the performance of his legal obligations. The *Ingstrum* decision, however, may be significant of a new attitude which the courts will adopt in their jurisdiction over "non-support" cases. If sustained, the case may influence further judicial opinion to the extent that third-party actions against the husband will be curtailed entirely. The thought that the husband is entitled to choose the persons with whom his wife has pledged his credit is not without merit and is appealing to one's sense of justice and fair dealing. It would seem more appropriate that the wife secure a judicial separation wherein her maintenance is provided for, rather than be permitted to pledge indiscriminately her husband's credit with persons who, very conceivably, he might object to. Strangers who deal with a wife should do so on her own credit, or if she is believed to be financially irresponsible, should not extend credit at all. It should be noted that this new application of the law would be valid only in those instances where the spouses have separated by consent. There is no doubt as to the right of an abandoned spouse to pledge her husband's credit. We do not believe that the legislature would sanction a proposal to abolish third-party actions against the husband, but it is not entirely improbable that courts will by the weight of judicial decree relieve the husband of this not infrequent nuisance.

RAYMOND J. MARGLES.

STATUTORY LIMITATION FOR FRAUD ACTIONS.

One of the outstanding problems that confront us in a consideration of the Statute of Limitations may be stated thus: Does the statutory period in actions founded in fraud run from the time of the perpetration of the fraud or the discovery thereof?¹

The New York Legislature had apparently solved this problem by the clear and unmistakable wording of Section 48, subdivision 5, of the New York Civil Practice Act.² The decision in *Brick v. Cohn*-

⁵¹ See note 7, *supra*.

⁵² See note 27, *supra*.

¹ BALLANTINE, LIMITATIONS (1829) 86 n.1; BANNING, LIMITATION OF ACTIONS (3d ed. 1906) 2; *Troup v. Smith Ex'rs*, 20 Johns. 43 (N. Y. 1822); *Leonard v. Pitney*, 5 Wend. 30 (N. Y. 1830); *First Mass. Turnpike Corp. v. Field*, 3 Mass. 201 (1807).

² N. Y. CIV. PRACT. ACT § 48, subd. 5, "The following actions must be commenced within six years after the cause of action has accrued: * * * Any action to procure a judgment on the ground of fraud. The cause of action in such a case is not deemed to have accrued until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud." (This section will hereafter be referred to as the fraud Statute of Limitations.)

Hall-Marx,³ however, created a state of confusion. Briefly stated, the holding in that case is to the effect that in an action for fraud and deceit based on a fraudulent breach of contract, the Statute of Limitations in contract actions rather than tort actions controls, and the limitation is measured from the date of the breach of contract and not from the date of the discovery thereof. The case raises two fundamental problems: *first*, whether or not a fraudulent breach of contract gives rise to a tort action for fraud and deceit; *second*, is the fraud Statute of Limitations⁴ inoperative until the discovery of the fraud? This note considers these two problems.

I.

The fundamental principle underlying any judicial system is to afford every individual an equal opportunity to remedy the wrongs inflicted upon him. Under the common law, there was no set period of time within which these grievances were required to be legally adjusted.⁵ A fixed period, however, became a necessity as civilization became more complex. Therefore, beginning with the reign of Henry I, a series of statutes were passed which were in form the same as our own Statute of Limitations.⁶

These statutes were designed not to confer substantive rights⁷ but rather to set an arbitrary limit within which causes of action must be commenced.⁸ The legislatures, in establishing these so-called

³ 276 N. Y. 259, 11 N. E. (2d) 902 (1937).

⁴ *Id.* at 263, 264, 265, 11 N. E. (2d) at 903, 904; see note 2, *supra*.

⁵ 37 C. J. (1925) 686; *Hauenstein v. Lynham*, 100 U. S. 487 (1879); *Wilcov v. Fitch*, 20 Johns. 472, 475 (N. Y. 1823) ("* * * by the common law there was no stated or fixed time as to the bringing of actions."); *People v. Gilbert*, 18 Johns. 228 (N. Y. 1820); *Rouss v. Ditmore*, 122 N. C. 575, 30 S. E. 335 (1898); *Ireland v. McIntosh*, 22 Utah 296, 61 Pac. 901 (1900); *Johnson v. Merritt*, 125 Va. 162, 99 S. E. 785 (1919).

⁶ 36 C. J. (1925) 697, § 6, "* * * Statutes similar to (21 James c. 16), although with varying modifications, now exist both in England and in the different jurisdictions of this country."

The New York Statute of Limitations is contained in N. Y. Crv. Prac. Acr §§ 10-60; see also *Gilmore v. Ham*, 142 N. Y. 1, 6, 36 N. E. 826, 827 (1894).

⁷ *Cherrington v. South Brooklyn R. R.*, 180 App. Div. 659, 664, 168 N. Y. Supp. 322, 325 (2d Dept. 1917); *Hopkins v. Lincoln Trust Co.*, 115 Misc. 257, 260, 187 N. Y. Supp. 883, 885 (1921) ("Statutes of limitation are remedial only. They in no manner partake of the nature of substantive law. They regulate only the affairs of men."); *Donovan v. Duluth St. Ry.*, 150 Minn. 364, 185 N. W. 388 (1921); *Johnson v. Wynne*, 64 Kan. 138, 67 Pac. 549 (1902). See note 34, *infra*.

⁸ *Matter of Tassell*, 119 Misc. 478, 481, 196 N. Y. Supp. 491, 494 (1922); *Battle v. Shivers*, 39 Ga. 405 (1869); *Baker v. Kelly*, 11 Minn. 480 (1866).

WOOD, THE LIMITATION OF ACTIONS (3d ed. 1901) 1, "The Statute of Limitations are such legislative enactments as prescribed periods within which actions may be brought upon certain claims, or within which, certain rights may be enforced;—and those statutes which merely restrict a statutory or

reasonable periods, were guided by the "general experience of mankind,—that claims which are valid are not usually allowed to remain neglected, and that the lapse of years without any attempt to enforce a demand creates a presumption against its original validity or that it has ceased to exist."⁹

II.

Fraud is actual when an intent to deceive is present,¹⁰ or constructive, when this distinguishing characteristic—intent to deceive—is lacking.¹¹ The earliest statutory enactment involving the Statute of Limitations in this connection included actual fraud, both at law and in equity.¹² The limitation period under this enactment was held to operate from the discovery of the facts constituting the fraud. This condition obtained until the passage of a revised statute in 1848 which limited the cases in which the Statute of Limitations would run from the discovery of the fraud. Under this later enactment, the only time the Statute would run from the discovery of the fraud was when the suit was brought in equity and included no alternative legal re-

other right do not come under this head, but rather are in the nature of conditions put by the law upon the right given."

BANNING, *loc. cit. supra* note 1: "The Statute of Limitations (it has been said) are statutes of *repose* * * *" (Italics ours.) *Semble*, *Shepherd v. Thompson*, 122 U. S. 231, 7 Sup. Ct. 1229 (1887); *House v. Carr*, 185 N. Y. 453, 78 N. E. 171 (1906); *Dodds v. McColgan*, 134 Misc. 518, 235 N. Y. Supp. 492 (1929), *aff'd*, 229 App. Div. 273, 241 N. Y. Supp. 584 (1st Dept. 1930); *Hart v. Goodly*, 72 Misc. 232, 129 N. Y. Supp. 892 (1911); *In re Schaffer*, 53 Cal. App. 493, 200 Pac. 508 (1921); *McWherter v. Cheney*, 121 Ga. 541, 49 S. E. 603 (1904); *Davis v. Munie*, 235 Ill. 620, 85 N. E. 943 (1908); *Bauerman v. Scharlott*, 46 Kan. 480, 26 Pac. 1051 (1891); *Fix v. Cook*, 192 Ky. 731, 234 S. W. 453 (1921); *Gebair v. Jones*, 48 Utah 244, 158 Pac. 426 (1916); *Betterman v. Cowley*, 19 Wash. 207, 53 Pac. 53 (1898).

⁹ 37 C. J. (1928) 685, §2; *Riddlesbarger v. Hartford Fire Ins.*, 7 Wall. 386 (U. S. 1868); *Buchanan v. Roland*, 5 N. J. L. 721 (1819); *Gautier v. Franklin*, 1 Tex. 732 (1847); see KELLEY, CODE OF LIMITATIONS (1903) (for a study of the history of New York Statute of Limitations); PRASHKER, CASES AND MATERIALS ON NEW YORK PLEADING AND PRACTICE (2d ed. 1937) c. I (for a study of the cases and materials interpreting the present New York Statute of Limitations).

¹⁰ *Ultramares Corp. v. Touche*, 255 N. Y. 170, 174 N. E. 441 (1931); *Thayer v. Schellely*, 137 App. Div. 166, 121 N. Y. Supp. 1064 (1st Dept. 1910); *Rose v. Goodale*, 169 N. Y. Supp. 446 (1918); see note 11, *infra*.

¹¹ *Lammer v. Stoddard*, 103 N. Y. 672, 9 N. E. 328 (1886); *Spallholz v. Sheldon*, 216 N. Y. 205, 110 N. E. 328 (1915); *Pitcher v. Sutton*, 238 App. Div. 291, 264 N. Y. Supp. 488 (4th Dept. 1933), *aff'd*, 264 N. Y. 638, 191 N. E. 603 (1934).

¹² N. Y. CODE CIV. PROC. (1788) §71, subd. 6 provides that "An action for relief on the ground of fraud, the cause of action in such case is not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud."

lief.¹³ In 1887 the effect of this section was broadened by an amendment declaring that so long as the suit was brought in equity the limitation period would be measured from the discovery of the fraud, in spite of the fact that additional prayers for legal relief (*e.g.*, money judgment in addition to an accounting) were included.¹⁴ Obviously, this increased the number of cases in which the Statute could apply. From 1848 until the passage of the modern statute in 1920¹⁵ there was no specific provision for the limitation of fraud actions at law included in the section, and in legal actions the time was measured from the date of the perpetration of the fraud, rather than from the discovery of the facts constituting it.¹⁶ In 1920 this result was alleviated by the passage of Section 48, subdivision 5, of the Civil Practice Act¹⁷ which declared in effect that *any* action for fraud runs from the discovery thereof. The *Lincoln Trust Co.*¹⁸ case construed this section to apply to actions at law as well as in equity and thus the present-day effect of the Statute was attained.

Constructive fraud does not involve actual intent to defraud and is a purely equitable result achieved by the courts to prevent injustice. In these cases fraud is merely inferred and is not a constituent part of the action as pleaded.¹⁹ Therefore, constructive fraud is not included in Section 48, subdivision 5,²⁰ which measures the period of

¹³ N. Y. CODE CIV. PROC. (1848) § 91, subd. 6 provides that "An action for relief, on the ground of fraud; in cases which heretofore were *solely* cognizable by the court of chancery; the cause of action in such case is not to be deemed to have accrued, until the discovery by the aggrieved party, of the facts constituting the fraud." (Italics ours); *Northrop v. Hill*, 57 N. Y. 351 (1874).

¹⁴ N. Y. CODE CIV. PROC. (1848) § 91, subd. 6 was amended by the Laws of 1877, c. 416, 422, to become part of REV. STAT. § 383, subd. 5 and provides that "An action to procure a judgment other than for a sum of money on the ground of fraud in a case which on the 31st day of December, 1846 was cognizable by chancery. The cause of action in such a case is not deemed to have accrued until the discovery by the plaintiff or the person under whom he claims of the facts constituting the fraud." (Later amended by the Laws of 1920, c. 199 to become § 48, subd. 5 of N. Y. CIV. PRAC. ACT [see note 2, *supra*]); *Carr v. Thompson*, 187 N. Y. 160 (1881); *Model Building and Loan Ass'n v. Reeves*, 236 N. Y. 331, 140 N. E. 715 (1923).

¹⁵ N. Y. CIV. PRAC. ACT § 48, subd. 5.

¹⁶ *Ball v. Gerard*, 160 App. Div. 619, 146 N. Y. Supp. 81 (1st Dept. 1914); *East River Nat. Bank v. Columbia Trust Co.*, 171 N. Y. Supp. 384, 385 (1918).

¹⁷ See note 2, *supra*.

¹⁸ *Hopkins v. Lincoln Trust Co.*, 233 N. Y. 213, 215, 135 N. E. 267 (1922); Note (1938) 12 ST. JOHN'S L. REV. 317; *Keys v. Leopold*, 241 N. Y. 189, 193, 149 N. E. 828, 829 (1925): "When a legal and equitable remedy exists as to the same subject-matter, the latter is under the control of the same statutory bar as the former."; see *Rundle v. Allison*, 34 N. Y. 80 (1866).

¹⁹ *Ericksen v. Quinn*, 47 N. Y. 410 (1872); *Cole v. Tyler*, 65 N. Y. 73 (1875); *Smith v. Reid*, 134 N. Y. 568 (1892); see note 11, *supra*, and note 73, *infra*.

²⁰ *Pitcher v. Sutton*, 238 App. Div. 291, 293, 264 N. Y. Supp. 488, 491 (4th Dept. 1933) ("In an action based on constructive fraud the ten year limitation commences to run from the date when the act or omission constituting it occurs, and not from the time when the facts constituting the fraud were discovered. * * * The fraud which is referred to in this section is actual fraud and not constructive fraud."); *McKenzie v. Wappler Electric Co.*, 128 Misc. 827,

limitation as running from the date of discovery of the facts constituting the fraud.²¹ The section which applies to suits in equity is Section 53,²² the "catch-all" clause, which sets the period of limitation as ten years in all cases not otherwise specifically enumerated. This section has been held to make the limitational period applicable from the perpetration rather than from the discovery of the fraud,²³ thus creating a distinction between actual fraud at law or in equity, and constructive fraud in equity.

In this connection it may be noted that courts of equity will not assist an individual in the perpetration of a fraud and will estop him from "interposing the statute" of limitations "as a defense" where one is guilty of fraudulent concealment in causing the Statute to run its limits.²⁴

To reiterate, at present the Statute of Limitations, in cases involving constructive fraud, begins to operate from the time the fraud is perpetrated,²⁵ whereas in actual fraud the Statute begins to operate from the time the facts constituting the fraud are discovered.²⁶

219 N. Y. Supp. 580 (1926), *aff'd*, 215 App. Div. 336, 213 N. Y. Supp. 389 (1st Dept. 1927); *Hart v. Goodley*, 72 Misc. 232, 129 N. Y. Supp. 892 (1911) ("The six year statute does not apply to causes of action in equity based on constructive fraud."); see also Note (1938) 12 ST. JOHN'S L. REV. 317.

Exkorn v. Exkorn, 1 App. Div. 124, 37 N. Y. Supp. 68 (1st Dept. 1896). The fraud Statute of Limitations is limited to fraud actions and all other causes of actions are excluded from its operation. For exceptions to this rule see PRASHKER, *loc. cit. supra* note 9.

²¹ *Ibid.*

²² N. Y. CIV. PRAC. ACT § 53 provides: "Limitation where none specifically prescribed. An action, the limitation of which is not specifically prescribed in this article must be commenced within ten years after the cause of action accrues."

²³ *Pitcher v. Sutton*, 238 App. Div. 291, 264 N. Y. Supp. 488 (4th Dept. 1933), *aff'd*, 264 N. Y. 638, 191 N. E. 603 (1934) ("In an action based on constructive fraud the ten year limitation [N. Y. CIV. PRAC. ACT § 53] commences to run from the date when the act or omission constituting it occurs, and not from the time when the facts constituting the fraud were discovered.").

²⁴ *Dodds v. McColgan*, 134 Misc. 518, 235 N. Y. Supp. 492 (1929), *aff'd*, 229 App. Div. 273, 241 N. Y. Supp. 584 (1st Dept. 1930). A note, given for work, labor and services, could be enforced in a court of equity, although the Statute of Limitations had run due to defendant's fraudulent concealment. This is discussed in PRASHKER, *op. cit. supra* note 9, at 32; see also (1930) 29 MICH. L. REV. 117; *House v. Carr*, 185 N. Y. 453, 78 N. E. 171 (1906); *Lightfoot v. Davis*, 198 N. Y. 261, 91 N. E. 582 (1910); *Clark v. Gilmore*, 149 App. Div. 445, 450, 133 N. Y. Supp. 1047, 1050 (1st Dept.) ("Where one has obtained an advantage by fraud, equity will not permit him to hold it by resorting to the Statute of Limitations"). But *cf.* *Smith v. Troup's Ex'rs*, 20 Johns. 43 (N. Y. 1822); *Leonard v. Pitney*, 5 Wend. 30 (N. Y. 1830); *Fritts v. Slade*, 9 Hun 145 (N. Y. 1876). *Contra*: *The First Mass. Turnpike Co. v. Field*, 3 Mass. 201 (1807); *Murray v. Chicago N. W. Co.*, 92 Fed. 868 (C. C. A. 8th, 1899); *Boomer v. French*, 40 Iowa 601 (1875); see note 8, *supra*.

²⁵ See note 23, *supra*.

²⁶ *Piper v. Hoard*, 107 N. Y. 67, 13 N. E. 632 (1887) (When the statute has commenced to run against such an action it is not suspended by the perpetration of a new fraud); *Decker v. Decker*, 108 N. Y. 128, 15 N. E. 307 (1888); *Miller v. Wood*, 116 N. Y. 351, 22 N. E. 553 (1889); *Gallup v. Bernd*, 49 Hun 605, 1 N. Y. Supp. 478 (5th Dept. 1888); *Rosenberg v. Rosenberg*, 241

The word "discovery" as used in the fraud Statute of Limitations has been interpreted by the courts of New York to be synonymous with the word "notice".²⁷ It is superfluous to reiterate that no individual may blind himself to realities and still receive a court's protection. Courts are willing to protect the diligent, but refuse to protect the negligent.²⁸ Therefore, the Statute of Limitations in fraud actions starts to operate at the time one is put on "notice" of the facts constituting the fraud.²⁹ Whether or not an individual has been put on "notice" is a question of fact to be answered by the jury, basing its conclusion on all the evidence in the particular case.³⁰ However, if the facts are not in dispute, and only one interpretation can be drawn therefrom, it becomes a question of law.³¹ The burden of proving freedom from "notice" is on the one alleging the fraud.³²

III.

BRICK V. COHN-HALL-MARX

New York Rule: The present wording of Section 48, subdivision 5,³³ referring to actual fraud and giving the period of limitation as commencing from the discovery of the fraud presents no obvious ambiguities and was interpreted with facility by the courts for more than a decade. It remained for the case of *Brick v. Cohn-Hall-Marx*³⁴ to inject new confusion into the law by its interpretation of this sec-

App. Div. 510, 272 N. Y. Supp. 429 (1st Dept. 1934). For further list of cases see 1 NICHOLS-CAHILL, N. Y. CIV. PRAC. ACT (1937) 160, 161; Note (1938) 12 ST. JOHN'S L. REV. 317; see also note 63, *infra*.

²⁷ Talmadge v. U. S. Shipping Bd. Emergency Fleet Corp., 54 F. (2d) 240, 243 (C. C. A. 2d, 1932). Under § 48, subd. 5, N. Y. CIV. PRAC. ACT: "It is enough * * * that the victim of fraud is put on notice of the practice upon him, he need not know the full details." *Gates v. Andrews*, 37 N. Y. 657 (1868); *Kent v. Kent*, 62 N. Y. 560 (1875); *Decker v. Decker*, 108 N. Y. 128, 1 N. E. 307 (1888); *Weaver v. Haviland*, 142 N. Y. 534, 535, 37 N. E. 641, 642 (1893): "The time when the fraud was committed is not the period from which the limitation is to be computed, *but the time when the plaintiff had acquired a standing to assail it.*" (Italics ours.)

²⁸ *Campbell v. Culver*, 56 App. Div. 591, 67 N. Y. Supp. 469 (4th Dept. 1900).

²⁹ See note 25, *supra*.

³⁰ O'TOOLE, LAW OF EVIDENCE (2d ed. 1937) c. 5, p. 133; GREENLEAF, LAW OF EVIDENCE (15th ed. 1892) c. 1, p. 49; *Stachers v. N. Y. Central R. R.*, 71 N. Y. 464 (1880); *McDonald v. Metropolitan*, 167 N. Y. 66, 60 N. E. 284 (1901); *People v. Walker*, 198 N. Y. 329, 91 N. E. 806 (1910); *Marshal v. Seely*, 49 App. Div. 433, 63 N. Y. Supp. 335 (1st Dept. 1900).

³¹ *Ibid.*; *Outhouse v. Baird*, 121 App. Div. 556, 106 N. Y. 241 (2d Dept. 1907).

³² *Town of Venice v. Breed*, 65 Barb. 597 (1873); *Gaines v. Huyler*, 113 Misc. 188, 184 N. Y. Supp. 145 (1920); for collection of cases see NICHOLS & CAHILL, *loc. cit. supra* note 26.

³³ See note 2, *supra*.

³⁴ 276 N. Y. 259, 11 N. E. (2d) 902 (1937).

tion. In this case the parties in interest entered into an agreement in 1924 whereby the defendant was to pay the plaintiff a certain percentage of the sales of a patented article in consideration of the relinquishment by the plaintiff of all claims to the patent. The defendant then allegedly caused fraudulent books to be kept and the plaintiff, as a result, received only half of the royalties to which he was entitled. This fraud the plaintiff claimed he did not discover for more than ten years. Thereafter, he brought an action in fraud and deceit to recover the damages caused by the defendant's alleged wrongdoing. The defense interposed was the Statute of Limitations—specifically, Section 48, subdivision 1, of the Civil Practice Act.³⁵ The question to be adjudicated was under which section of the Statute of Limitations did the present case fall? If it was to be regarded as subject to the Statute of Limitations for fraud actions the plaintiff was entitled to relief because the action was brought within six years after the plaintiff discovered the facts constituting the fraud. If, however, the action was essentially one in contract it would be barred by the defendant's act of pleading the Statute of Limitations since in such actions the Statute begins to operate from the date of the breach of contract.³⁶ The Appellate Division was unanimous in holding that this action came within the confines of the fraud Statute of Limitations.³⁷ The Court of Appeals, too, was unanimous in holding that, "The basis of the action is the contract. The claim of the plaintiff is based upon the contract, * * *. Even though the defendant may have falsely stated the amount of the sales and rendered false statements, the fact remains that its liability on the actual amount of sales depends upon the contract."³⁸ Thus the action was declared barred by Section 48, subdivision 1.³⁹

The cause of action, as a result, has the unique distinction of apparently having all the elements of a fraud action,⁴⁰ and yet having been called an action "based on contract".⁴¹ The court, however, was not entirely without precedent in its ruling inasmuch as it followed

³⁵ N. Y. CIV. PRAC. ACT. § 48, subd. 1 providing: "The following actions must be commenced within six years after the cause of action has accrued: 1. An action upon a contract obligation or liability expressed or implied, except a judgment or sealed instrument."

In a civil case, the Statute of Limitations must be pleaded in order that it may be available as a defense. O'TOOLE, *op. cit. supra* note 30, at 84.

³⁶ N. Y. CIV. PRAC. ACT § 48, subd. 5, or N. Y. CIV. PRAC. ACT. § 48, subd. 1.

³⁷ 251 App. Div. 300, 301, 296 N. Y. Supp. 342, 344 (1st Dept. 1937): "We are inclined to the view that the statute [§ 48, subd. 1, N. Y. CIV. PRAC. ACT] is not a bar to this action, which is predicated upon the theory of *fraud pure and simple* * * *. * * * we have concluded that the plaintiffs had pleaded facts sufficient to constitute a cause of action for fraud, * * *." (Italics ours.)

³⁸ 276 N. Y. 259, 263, 11 N. E. (2d) 902, 903 (1937).

³⁹ See note 35, *supra*.

⁴⁰ EDGAR AND EDGAR, LAW OF TORTS (3d ed. 1936) 178-187; Wasdell v. Fosdick, 13 Johns. 325 (1815); Whitney v. Allire, 1 N. Y. 304 (1848); Urtz v. N. Y. Central R. R., 202 N. Y. 170, 95 N. E. 711 (1911).

⁴¹ Brick v. Cohn-Hall-Marx, 276 N. Y. 259, 11 N. E. (2d) 902 (1937).

Carr v. Thompson,⁴² which is cited for the proposition that "An allegation of fraud was in no sense essential to 'cause of action' * * *; it could stand without it; omitting every such allegation it could still successfully defy a demurrer; it cannot be said to be founded on fraud, when that element is not essential; the proof of fraud becomes only necessary as to fit answer to a possible defense" and, therefore, was an action based on contract.⁴³

It would seem, therefore, that as a result of this case, a fraudulent breach of contract will not give rise to a tort action for fraud and deceit.⁴⁴ The rule laid down in the *Brick* case apparently is limited to cases where, (1) the contract is the crux of the fraud, (2) the contract is valid, and (3) the plaintiff has a successful action on the contract exclusive of the fraud.⁴⁵

Majority Rule: The rule in other jurisdictions is at variance with the rule as stated in the *Brick* case. These jurisdictions declare that, "The test * * * is not whether the fraud * * * occurred in a contract or independently of contract, but the test rather is whether the action seeks relief from or on account of the fraud * * *."⁴⁶

It is to be noted that there is a class of adjudicated cases in these states which in theory at least, favors the New York rule, since in both instances the actions are held based on contract. However, a distinguishing feature between these and the New York cases is patent. In those actions involving an apparent similarity with the New York rule, it is the defendant who is attempting to change the cause of action from one in contract to one in fraud. The defendant seeks to prove that the breach of contract was fraudulent. The reason is obvious: Since the shorter fraud Statute of Limitations will now apply, the plaintiff's action will be barred. Therefore, the plain-

⁴² 87 N. Y. 160 (1881), wherein an action by a principal to recover a certain sum of money from his agent, who fraudulently concealed this sum by rendering false accounts, was barred by the six-year Statute of Limitation (N. Y. Civ. PRAC. ACT § 48, subd. 1), because this action was based on the contract and not in fraud.

Brick v. Cohn-Hall-Marx, 251 App. Div. 300, 302, 296 N. Y. Supp. 342, 344 (1st Dept. 1937). The following distinction between this and the *Carr* case was made by Judge Glennon; *i. e.*, "We are told that the case of *Carr v. Thompson*, (87 N. Y. 160), controls. With that contention we cannot agree. There, the action was based upon a breach of contract. Here, the gravamen of the action is fraud." See also *Korner v. Appel*, 198 App. Div. 540, 190 N. Y. Supp. 619 (1st Dept. 1921); also, *People v. Strauss*, 155 Misc. 610, 281 N. Y. Supp. 200 (1935), for the same type of pleading. *Contra:* *Jacobs v. McGurk*, 242 App. Div. 612 (1st Dept. 1934), *aff'd without opinion*, 267 N. Y. 601, 196 N. E. 600 (1935). But see *Brick v. Cohn-Hall-Marx*, 276 N. Y. 259, 11 N. E. (2d) 902 (1937), wherein it is stated: "The fact, however, is that the point [in the *Brick* case] was not raised or considered in this Court, as no ruling or exception permitted us to pass upon it." But *cf.* *Ponozzo v. Carborundum*, 7 F. Supp. 317 (W. D. N. Y. 1934); see note 64, *infra*.

⁴³ *Carr v. Thompson*, 87 N. Y. 160, 165 (1881).

⁴⁴ See note 42, *supra*, and note 65, *infra*.

⁴⁵ *Ibid.*

⁴⁶ *Hillock v. Idaho Title & Trust Co.*, 22 Idaho 440, 126 Pac. 612, 616 (1912). See note 47, *infra*.

tiff in these cases is permitted to choose between a fraud action or an action based on contract.⁴⁷

By contrast, the plaintiff under the New York rule is placed under a decided disadvantage. This results from the fact that the New York courts arbitrarily construe his action as one in contract.⁴⁸ And since in New York the Statute of Limitations, for both fraud and contract, runs for six years, the Statute will run sooner on the contract action because it begins to operate from the date of the breach thereof.⁴⁹ Whereas, if the plaintiff were permitted to bring his action in fraud, the Statute would not run until he had discovered the fraud.⁵⁰

Thus, from a practical viewpoint an individual within the jurisdiction of the New York courts has but a single remedy when a contract is fraudulently breached—an action on contract⁵¹—whereas in other jurisdictions he has the optional remedies of either an action on the contract or an action in tort, for fraud and deceit.⁵²

Basis of Conflict: The reason for the conflicting rules in this connection is the fact that in cases of this type concurring legal principles without any clear line of demarcation are involved. These actions include both fraud and contract elements and when courts are faced with the choice of applying the rules of either of the two, there is an understandable difference of opinion which gives rise to the conflicting rules in different states. The basic distinctions underlying these conflicting rules are:

1. In pleading a cause of action the subject matter rather than the form is the controlling factor.⁵³ This rule is strictly applied in

⁴⁷ Sandorell v. Randolph, 11 Ariz. 371, 95 Pac. 119 (1908); Boyer v. Barrows, 166 Cal. 757, 138 Pac. 354 (1914); Murto v. Lemar, 19 Colo. App. 314, 75 Pac. 160 (1903); Gregory v. Williams, 106 Kan. 819, 289 Pac. 933 (1920); Hawk v. U. S. Fidelity & Guaranty Co., 83 Kan. 775, 777, 112 Pac. 602 (1911); Waldorf v. Ciolino, 13 La. App. 646, 127 So. 445 (1930); Ross v. Saylor, 39 Mont. 559, 104 Pac. 864 (1909); Brown v. Logan, 20 Okla. 334, 95 Pac. 441 (1908); Clark v. Lund, 55 Utah 284, 184 Pac. 821 (1919); Missouri Saving & Loan Co. v. Rice, 84 Fed. 131 (C. C. A. 8th, 1897); cf. Hall v. Banker's Trust Co., — Colo. —, 74 P. (2d) 720 (1937) holding that the plaintiff may recover certain moneys "which he alleges he paid only by reason of alleged false representations. * * * Instead of affirming the original contract and exercising his right to sue in tort the damages on account of injuries sustained by such representations * * * declared a rescission and brought an action *ex contractu* to recover the payment he had made." This is due to the fact that an action on implied contract accrued after the rescission. Therefore, the action for money had and received will lie. Gibson v. Hanly, 131 Cal. 6, 63 Pac. 61 (1900). *Contra:* Murray v. Chicago R. R., 92 Fed. 868 (C. C. A. 8th, 1899); see Kirby v. Lake Shore, 120 U. S. 130, 7 Sup. Ct. 430 (1887).

⁴⁸ See note 42, *supra*; note 65, *infra*.

⁴⁹ See note 35, *supra*.

⁵⁰ See note 26, *supra*.

⁵¹ See note 42, *supra*.

⁵² See note 47, *supra*.

⁵³ Brick v. Cohn-Hall-Marx, 276 N. Y. 259, 11 N. E. (2d) 902 (1937); Horowitz v. Horowitz, 132 Misc. 493, 230 N. Y. Supp. 139 (1928); note 83, *infra*.

the formulation of the New York doctrine. To quote from the *Brick* case,⁵⁴ "To say that the complaint is framed in fraud and not upon contract may be true in theory, but in applying the Statute of Limitations we look for the reality and the essence of the action and not the mere name." As a general proposition this is true in all states where "code" forms⁵⁵ rather than "common law"⁵⁶ forms are used.

2. The majority rule outside of New York has the "election of remedies" as its dominating principle.⁵⁷ The doctrine as applied in this connection has been very ably stated by Judge Sanborn thus: "It is very frequently the case when a covenant is broken * * * [that a fraud is committed] but one who breaks his agreement cannot deprive the other party to the contract of his right of action for the breach by committing a breach and a fraud at the same time. In such a case the injured party has a right of action for relief on the grounds that the contract is broken, and a right of action for relief on the ground of fraud, and the wrongdoer has not, but the injured party has, the choice of remedies. He may bring his action for damages for the fraud, or he may waive the tort and sue on the contract."⁵⁸

In formulating our rule the New York courts have not only overlooked the "election of remedies" doctrine but have also refused to take cognizance of two cardinal principles: *First*, "A tort may be dependent upon or independent of contract. If a contract imposed a legal duty upon a person, the neglect of that duty is a tort founded on contract, so that *an action ex contractu for the breach of the contract or an action ex delicto for the breach of duty may be brought at the option of the plaintiff.*" (Italics ours.)⁵⁹ *Second*, "The Statute of Limitations is one of repose. It does not pay a debt or extinguish * * * [a right] but merely bars the remedy by the form to which it applies leaving available to the plaintiff every other lawful means for realizing on the debt [or right]."⁶⁰

IV.

Effect of the New York Rule: The New York rule, as a result of the *Brick* case,⁶¹ is that a fraudulent breach of contract does not

⁵⁴ 276 N. Y. 259, 264, 11 N. E. (2d) 902, 904 (1937).

⁵⁵ *McDonald v. Reich and Lievre*, 110 Cal. App. 736, 281 Pac. 106 (1929); *Oregon v. McNeile*, 103 Kan. 629, 175 Pac. 633 (1918).

⁵⁶ *Bates v. Bates*, 230 Ill. 679, 82 N. E. 911 (1907); see 114 A. L. R. 525.

⁵⁷ See note 47, *supra*.

⁵⁸ *Missouri Savings & Loan Co. v. Rice*, 84 Fed. 131 (C. C. A. 8th, 1897).

⁵⁹ ADDISON, TORTS, p. 13, cited in *Hillock v. Idaho Trust Co.*, 22 Idaho 440, 449, 126 Pac. 612, 616 (1912); *Rich v. N. Y. Central*, 87 N. Y. 382 (1881); see notes 46, 47, *supra*.

⁶⁰ *Dodds v. McColgan*, 134 Misc. 518, 519, 235 N. Y. Supp. 492 (1929); see note 24, *supra*.

⁶¹ 276 N. Y. 259, 11 N. E. (2d) 902 (1937).

give rise to an action in tort for fraud and deceit.⁶² The result is the rather anomalous situation in which an action basically one in tort is measured by the contract Statute of Limitations (operating from the date of the breach of the contract). In addition, there remains a class of cases involving only the question of fraud, without involving the breach of a contract in which the Statute of Limitations runs from the discovery of the facts constituting the fraud.⁶³

It is obvious, therefore, that the *Brick* case,⁶⁴ making an action for the fraudulent breach of contract subject to the contract Statute of Limitations is momentous. It apparently abolishes a substantive right, *i.e.*, a tort action for fraudulent breach of contract. To the extent that the tort remedy has been abolished, fraud may be committed with impunity. Thus, if an individual fraudulently breaches a contract, and can successfully conceal the fraud for six years, then the courts will protect him in his fraudulent scheme. Many cases adjudicated since the *Brick* decision illustrate this point.⁶⁵

The harsh effect of the rule in the *Brick* case may be ameliorated, in part at least, if a case falls into one of the following categories:

⁶² See note 42, *supra*, and note 65, *infra*.

⁶³ *Bosley v. Nat. Machine Co.*, 25 N. Y. St. Rep. 575, 6 N. Y. Supp. 4 (1889); *Gates v. Andrews*, 37 N. Y. 657 (1868); *Kent v. Kent*, 62 N. Y. 560 (1875); *Fitts v. Beardsley*, 55 Hun 603, 8 N. Y. Supp. 567 (5th Dept. 1889); *Coffin v. Barber*, 155 App. Div. 713, 101 N. Y. Supp. 147 (4th Dept. 1906); *Hall v. Grays*, 227 App. Div. 337, 238 N. Y. Supp. 67 (3d Dept. 1929); *East River Sav. v. Barret*, 23 Misc. 423, 52 N. Y. Supp. 81 (1898); *cf. Exkorn v. Exkorn*, 1 App. Div. 124, 37 N. Y. Supp. 68 (1st Dept. 1896) (this section [48, subd. 5, N. Y. Civ. Prac. Act] is applicable to fraud actions exclusively); *Slayback v. Raymond*, 40 Misc. 601, 83 N. Y. Supp. 15 (1903). Laches is not strictly involved in pleading in this action. *Campbell v. Campbell*, 239 App. Div. 682, 268 N. Y. Supp. 789 (1st Dept. 1934), *aff'd*, 264 N. Y. 616, 191 N. E. 592 (1934), wherein it was held that the six-year statute of limitation does not apply to annulment actions on the ground of fraud, but § 1139, N. Y. Civ. Prac. Act applies. See note 26, *supra*.

⁶⁴ 276 N. Y. 259, 11 N. E. (2d) 902 (1937).

⁶⁵ *Drydock Knitting Mills, Inc. v. Queens Machine Corp.*, 254 App. Div. 568, 2 N. Y. S. (2d) 717, 718 (2d Dept. 1938): "An action to recover damages for a breach of a written contract by which defendant agreed to build three machines for plaintiff who agreed to purchase them at certain terms. *The fraudulent breach of contract does not give rise to an action for fraud.*" (Italics ours.) *Cook v. Schmidt*, — App. Div. —, 5 N. Y. S. (2d) 34, 35 (1st Dept. 1938): "The Court properly held that the payment of \$6000 per year under so-called 'French' agreement, was not salary under the plaintiff's agreement with defendant ***. We think *** that this case cannot be distinguished in principle from *Brick v. Cohn-Hall-Marx*, (276 N. Y. 259, 11 N. E. (2d) 902 (1937)). The alleged fraud was not extraneous to the contract and did not change the nature of the action from an action on the contract as alleged in the complaint, to an action in tort for fraud." *Quigg v. Neugass & Co.*, 254 App. Div. 710, — N. Y. Supp. (2d) — (2d Dept. 1938), holding that in an action based on alleged fraud in an employment contract, judgment dismissed. (The number of cases decided on this point, since the *Brick* case, already equals the number decided in the half century preceding the decision.)

1. "Where the defrauded party was induced to sign the instrument by false representations that it was an instrument of a different sort, and he is blind, illiterate or could not read without his glasses, and for that reason relied on the other party's representations as to what the instrument was or contained, or where he read the instrument himself but surreptitiously another instrument was substituted for him to sign, there is said to be fraud in the execution and such fraud renders the instrument void and not merely voidable."⁶⁶ Therefore, in such cases, an individual cannot bring to a successful conclusion an action based on the contract, and as a result actions based on "fraud in the execution" of a contract do not come within the confines of the rule in the *Brick* case.⁶⁷

2. This rule does not apply to cases where there is merely fraud in the inducement of the contract.⁶⁸ The defrauded plaintiff who in such an instance, commences a tort action for fraud and deceit, affirms the original validity of the contract and is barred thereby from commencing a successful action on the contract by the doctrine of "election of remedies". Such an action is entirely one in fraud and involves no breach of contract. Therefore, the fraud Statute of Limitations would apply and the case would not come in under the rule in the *Brick* case.⁶⁹

3. When fraud exists concurrently in the inducement and the performance of the contract, the plaintiff has a right to bring a suit in equity for rescission, thereby placing himself in *status quo*.⁷⁰ No doubt exists that an action for rescission comes within the provisions of the fraud Statute of Limitations.⁷¹

4. As to actions based upon fraud in the performance of a contract, if the relationship is purely contractual, the possibilities are very great that individuals are cautious enough to discover any breach within the six years allowed by Section 48, subdivision 1.⁷² The case, however, is exceptional where the relationship is purely contractual and a trust relationship cannot be implied,—for as a general proposition a trust relationship can be implied by the courts where property

⁶⁶ WHITNEY, LAW OF CONTRACTS (2d ed. 1934) 124, 125; *Whipple v. Brown Bros. Co.*, 225 N. Y. 237, 121 N. E. 748 (1916).

⁶⁷ Therefore, the third essential element of the rule in the *Brick* case, *i.e.*, the plaintiff must have a successful action on the contract exclusive of the fraud, is lacking.

⁶⁸ *Ibid.*

⁶⁹ WILLISTON, LAW OF CONTRACTS (Rev. ed. 1937) §§ 1524-1531. The plaintiff has, also, the choice of bringing an action for rescission. WHITNEY, *loc. cit. supra* note 66.

⁷⁰ *Ibid.*

⁷¹ *Higgins v. Crouse*, 147 N. Y. 411, 42 N. E. 6 (1895); *Bosley v. Nat. Machine Co.*, 22 N. Y. St. Rep. 575, 6 N. Y. Supp. 4 (1889); *Fitts v. Beardsley*, 55 Hun 603, 8 N. Y. Supp. 567 (5th Dept. 1889); *Slayback v. Raymond*, 93 App. Div. 326, 87 N. Y. Supp. 931 (1st Dept. 1904).

⁷² See note 35, *supra*.

has passed between the parties.⁷³ If a trust relationship is created, Section 15 of the Civil Practice Act applies and the Statute is not put in operation until a demand is made by the plaintiff.⁷⁴

5. If the relationship is purely contractual the rule in the *Brick* case⁷⁵ is broad enough to permit the plaintiff to recover. For, says Chief Justice Crane, "If there were fraud extraneous to the contract, * * * a different situation might arise. The plaintiff in such a case would have a cause of action for damages caused by the fraud * * *."⁷⁶

6. Apparently fraud actions, based on the fraudulent performance of an implied contract, would not come within the rule of the *Brick* case.⁷⁷ Because, "Under averments of * * * [such a] petition * * * [one] must show fraud in order to be entitled to recover * * *."⁷⁸ Causes of action based on implied contracts, also, lend themselves to trust and equitable actions, for the maxim, equity will not allow an individual to keep what in good conscience does not belong to him,⁷⁹ will apply.

7. The situation may arise where an accounting in equity is requested.⁸⁰ Section 53 of the Civil Practice Act would apply in such a case.⁸¹

8. Furthermore, although the parties have contractual duties, an action for fraud and deceit can still be maintained if the plaintiff can

⁷³ O'TOOLE, LAW OF TRUSTS (2d ed. 1935) § 77 states: "The absence of a definition of fraud and the reason for its absence are now traditional. Fraud remains undefined lest its definition defeat the purpose of equity to embrace all over-reachings, conspiracies, and breaches of duty within its jurisdiction. In cases of actual fraudulent intent, equity does not hesitate to declare a constructive trust, in order that full and complete justice may be done. Cases frequently arise, however, where there is no proof of actual fraudulent intent at the time the transaction is entered into, but where equity will apply the constructive trust theory to prevent what it characterizes as a constructive fraud."

Matter of O'Hara, 95 N. Y. 403 (1884); Wood v. Rabe, 96 N. Y. 414 (1884); Baker v. New York National Exchange Bank, 100 N. Y. 31, 2 N. E. 452 (1885): "The agent holds the goods and the proceeds upon an implied trust to dispose of the goods according to the direction of the principal, and to account for, and turn over to him the proceeds from sales." Amherst College v. Ritch, 151 N. Y. 282, 45 N. E. 876 (1897); Falk v. Hoffman, 233 N. Y. 199, 135 N. E. 243 (1922); Fur and Wool Trading Co. v. Fox, 245 N. Y. 215, 156 N. E. 670 (1927).

⁷⁴ N. Y. CIV. PRAC. ACT § 15.

⁷⁵ 276 N. Y. 259, 11 N. E. (2d) 902 (1937).

⁷⁶ *Id.* at 264, 11 N. E. (2d) at 904.

⁷⁷ 276 N. Y. 259, 11 N. E. (2d) 902 (1937).

⁷⁸ Gard v. St. John, 122 Kan. 477, 252 Pac. 212, 213 (1927); see note 67,

supra.

⁷⁹ See note 73, *supra*.

⁸⁰ Schantz v. Oabman, 163 N. Y. 148, 57 N. E. 288 (1900); Fur and Wool Trading Co. v. Fox, 245 N. Y. 215, 217, 156 N. E. 670, 672 (1927), holding in certain cases equity will entertain a suit for an accounting. "This is so where such a relation exists between the parties as under established principles entitles the one to demand it of the other."

⁸¹ See note 22, *supra*.

prove the essential elements of the tort without alleging the contract.⁸²

(Neither rule, of course, will tolerate the ingenuity of any "sharp practitioner" to escape the effect of the statute.)⁸³

The entire problem would be obviated if Section 48, subdivision 5,⁸⁴ were amended to include, by specific reference, the action for fraudulent breach of contract. In such case, it may read as follows:

Any action to procure a judgment on the ground of fraud, or of *fraudulent breach of contract*. The causes of actions in such cases are not deemed to have accrued until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud.

BENJAMIN BARTEL.

THE LAW OF THE CHARITABLE SUBSCRIPTION.

There has always been among men a concept of charity, but one quite different from that known to the members of a modern, Christian, democratic state, for the concept of charity has grown with the state and with the church so that today the courts are faced with unprecedented problems, akin to, but different from, the problems of any other age.

"The life of the law has not been logic, it has been experience."¹ In common law subjects, especially subdivisions of the law of contracts,² "a page of history is worth a volume of logic"³ for "very often the effect of history is to make the path of logic clear". Therefore, to understand the law of charities in general and more especially the law of the charitable subscription, it is necessary to consider briefly the growth of the concept of charity and its development.

Growth of the Concept of Charity.

Early and primitive charity was, like the primitive state, limited first to the family and later to the tribe, but the intercourse between

⁸² The rule in the *Brick* case does not apply because the first essential element is lacking, *i.e.*, the contract is the central theme of the fraud. See note 45, *supra*.

EDGAR AND EDGAR, *loc. cit. supra* note 40; (1937) 12 ST. JOHN'S L. REV. 135, 136; see notes 26, 62, *supra*.

⁸³ *Brick v. Cohn-Hall-Marx*, 276 N. Y. 259, 11 N. E. (2d) 902 (1937); *Horowitz v. Horowitz*, 132 Misc. 493, 230 N. Y. Supp. 139 (1920).

See Note, *The Statute of Limitations for Malpractice* (1938) 12 ST. JOHN'S L. REV. 330.

⁸⁴ See note 2, *supra*.

¹ HOLMES, *THE COMMON LAW* (1881) 1.

² *Mr. Justice Holmes in N. Y. Trust Co. v. Eisner*, 256 U. S. 345, 349, 41 Sup. Ct. 506, 508 (1920).

³ Holmes, *The Path of the Law* (1897) 10 HARV. L. REV. 457, 465.