

## Limitations of Actions in Equity in New York

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## LIMITATIONS OF ACTIONS IN EQUITY IN NEW YORK

"My Galli-gaskins that have long withstood  
The Winters' fury, and encroaching frosts  
By TIME subdued (what will not TIME subdue!)." <sup>1</sup>

**E**VER since the reign of Henry III there have been statutes in England limiting the time within which rights might be asserted in courts of law.<sup>2</sup> The unfairness of permitting a cause of action to be held forever as a sword over the head of the debtor or his descendants was thus early perceived and a great body of law has arisen that deals with the practical application of these periods of limitation to actual cases. Here the requirements of strict justice must give way to practical necessities, for it is obvious that if six years is the period of limitation for a particular action, a suit which may be brought on the last day of the sixth year will be forever barred if it is not brought until the first day of the seventh year. Here as elsewhere when we are dealing with *rules* of law, the exigencies of practical administration must control the urge to fairness which is after all basic in all jurisprudence.

In equity, where the rigid rules of the common law do not ordinarily obtain, the limitation of actions is an especially difficult problem. To solve it equity very early developed the doctrine of laches,<sup>3</sup> a natural corollary of the equitable maxim that only those who are vigilant to protect their rights can expect redress in a court of conscience. But the doctrine of laches has seldom been applied to defeat a cause of action in equity because of the mere lapse of time, without more.<sup>4</sup> It is necessary to show some disadvantage, however

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<sup>1</sup>From J. Phillip's *Splendid Shilling*; Gibbons, *A Treatise on the Law of Limitation and Prescription* (1835).

<sup>2</sup>3 Blackstone's *Comm.* (1791) p. 189.

<sup>3</sup>1 Pomeroy, *Equity Jurisprudence* (4th ed., 1918), Sec. 419. "A court of equity which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and *reasonable diligence*" citing *Haney v. Legg*, 129 Ala. 619 (1900).

<sup>4</sup>*Seligson v. Weiss*, 222 App. Div. 634, 227 N. Y. Supp. 338 (1st Dept. 1928). In addition, it has been stated that where an action seeks an equitable

slight, accruing to the defendant before he can avail himself of the defense of laches.<sup>5</sup>

It is very dubious whether practical necessity requires anything more than the application of the doctrine of laches to equitable suits plus the refusal of a court of equity in its sound discretion to give relief to one who has slept on his rights for an unreasonable length of time. Were the law to be left in this state, the determination of whether or not a particular suit in equity may be brought would depend on judicial discretion to be exercised with regard to the state of facts as presented in the record. While this is perhaps too great a swing in the direction of individual justice, it would have the advantage of making unnecessary the application of a rigid period of time beyond which a cause of action in equity could not be brought. On the other hand, it would render entirely unpredictable the result that may follow a more or less protracted delay to enforce equitable rights.

In New York, as in most jurisdictions, there are statutes enacting specific periods of limitations to various causes of action, and finally a blanket statute, section 53 of the Civil Practice Act, which provides that "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."<sup>6</sup>

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remedy in aid of or to enforce a legal right suit cannot be barred by the interposition of the doctrine of laches. *Galaway v. M. E. R. Co.*, 128 N. Y. 132, 28 N. E. 479 (1891); *White v. Miller*, 78 Misc. 428, 139 N. Y. Supp. 660 (1912). It therefore appears that the doctrine of laches may be invoked only where the remedy sought is purely equitable in nature.

<sup>5</sup> "Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as an estoppel against the assertion of the right. The disadvantage may come from a loss of evidence, change of title, intervention of equities and other causes; but when a court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief." *Chase v. Chase*, 20 R. I. 202 at 203, 204 (1897).

<sup>6</sup> Formerly Code of Civil Procedure, Sec. 388 (1877) and previous to that Code of Procedure, Sec. 97 (1848). See *Hayden*, Code of Procedure (1848) p. 215.

It has been said by the courts in this state that this section provides a statutory limitation of time within which all actions in equity must be brought.<sup>7</sup> If this is so, it follows that as soon as a cause of action in equity has accrued the statute begins to run and that ten years thereafter the cause of action is barred and may be successfully defeated by pleading the statute of limitations. That result has actually followed this line of reasoning in many groups of cases where merely equitable relief was sought. Thus an action to establish and enforce a constructive trust,<sup>8</sup> or an action to secure an accounting,<sup>9</sup> to be successful, must be commenced within the statutory period. So too, other actions in equity for specific performance,<sup>10</sup> for fraud<sup>11</sup> and mistake,<sup>12</sup> reformation,<sup>13</sup> rescission<sup>14</sup> and cancella-

<sup>7</sup> *Brinckerhoff v. Bostwick*, 99 N. Y. 185, 193 (1885). In *Gilmore v. Ham*, 142 N. Y. 1 at 7, 36 N. E. 826 at 827 (1894) Finch, J. stated, "Under the law of this state there is a fixed limitation for every cause of action, whether legal or equitable."

<sup>8</sup> *Pierson v. Morgan*, 121 N. Y. 705, 24 N. E. 1100 (1890) *aff'd* 52 Hun 611, 4 N. Y. Supp. 898 (1889); *Finnegan v. McGuffog*, 139 App. Div. 899, 123 N. Y. Supp. 539 (1st Dept. 1910) *aff'd* 203 N. Y. 342, 96 N. E. 1015 (1911); *Yeoman v. Townshend*, 74 Hun 625, 26 N. Y. Supp. 606 (1893); *Chorrmann v. Bachmann*, 119 App. Div. 146, 104 N. Y. Supp. 151 (2nd Dept. 1907); *Jessup v. Witherbee Real Est. & Impr. Co.*, 63 Misc. 649, 117 N. Y. Supp. 276 (1909) appeal dismissed 139 App. Div. 918, 124 N. Y. Supp. 1118 (2nd Dept. 1910).

<sup>9</sup> *Treadwell v. Clark*, 73 App. Div. 473, 77 N. Y. Supp. 350 (1st Dept. 1902); *Monroe v. Turner*, 114 App. Div. 634, 100 N. Y. Supp. 27 (4th Dept. 1906); (as to accounting between partners) *Gray v. Green* 125 N. Y. 203, 26 N. E. 253 (1891), *id.* 142 N. Y. 316, 37 N. E. 124 (1894); *Gilmore v. Ham*, *supra* note 7; *Sterling v. Chapin*, 102 App. Div. 589, 92 N. Y. Supp. 904 (1st Dept. 1905); *Hutchinson v. Sperry*, 79 Misc. 523, 140 N. Y. Supp. 220 (1913); (by trustee) *Bushe v. Wright*, 118 App. Div. 320, 103 N. Y. Supp. 410 (1st Dept. 1907) *aff'd* 195 N. Y. 509, 88 N. E. 1116 (1909); *Miller v. Parkhurst*, 45 Hun 590, 9 N. Y. St. Rep. 759 (1887).

<sup>10</sup> *Bruce v. Tilson* 25 N. Y. 194 (1862); *McCotter v. Lawrence*, 4 Hun 107 (N. Y. 1875); *Kelly v. Potter*, 16 N. Y. Supp. 446 (1891).

<sup>11</sup> *Carr v. Thompson*, 87 N. Y. 160 (1881); *Bosley v. N. M. Co.*, 123 N. Y. 550, 25 N. E. 990 (1890); *Continental Securities v. Belmont*, 168 App. Div. 483, 154 N. Y. Supp. 54 (2nd Dept. 1915) *aff'd* 222 N. Y. 673, 119 N. E. 1036 (1918).

<sup>12</sup> *Salisbury v. Morss*, 55 N. Y. 675 (1874); *Gallup v. Bernd*, 132 N. Y. 370, 30 N. E. 743 (1892); *Oakes v. Howell*, 27 How. Pr. 145 (N. Y. 1864).

<sup>13</sup> *Day v. Town of New Lots*, 107 N. Y. 148, 13 N. E. 915 (1887); *Sprague v. Cochran*, 144 N. Y. 104, 38 N. E. 1000 (1894).

<sup>14</sup> *Latour v. Latour*, 134 La. 342, 64 So. 133 (1914); *Marlborough v. Roundtree*, 128 La. 39, 54 So. 463 (1911); *McLean v. Stith*, 112 S. W. 355 (Tex. Civ. App. 1908); *Hawkins v. Blake*, 69 W. Va. 190, 71 S. E. 191 (1911); *McCann v. Welch*, 106 Wis. 142, 81 N. W. 996 (1900).

tion,<sup>15</sup> all must be commenced within the period provided for by section 53.<sup>16</sup> In the following pages we will analyze and classify the cases dealing with the application of periods of limitation to causes of action in equity in order to determine to what extent the rule referred to and thus applied has been carried out in practice.

(1) CONCURRENT ACTIONS IN LAW AND EQUITY.

Another very general proposition which is frequently found in the cases and texts is that where a cause of action may be brought concurrently in law or in equity, the statute applicable to the legal remedy applies also to the equitable remedy.<sup>17</sup> Here again the period of limitation may be extended or contracted by a determination as to whether or not the plaintiff might have secured in a court of law the relief asked for in equity. The rule as stated above appears elementary albeit its application entails a more serious consideration. It was held in *Borst v. Corey*,<sup>18</sup> in an action to enforce an equitable lien for the unpaid purchase price of land that the plaintiff had an adequate remedy at law on the debt and, having failed to prosecute his action within the time allowed at law, he was forever barred from relief in equity. The lien sought by plaintiff was declared to be a mere incident of the debt. The soundness of the reasoning in this decision has been questioned<sup>19</sup> but the rule fol-

<sup>15</sup> *Ibid.*

<sup>16</sup> The enumeration of equitable actions here set forth is not intended to be exclusive.

<sup>17</sup> *Butler v. Johnson*, 111 N. Y. 204, 18 N. E. 643 (1888); *Keys v. Leopold*, 241 N. Y. 189, 149 N. E. 828 (1925); *Carmody*, *New York Practice* (1930), Sec. 409. "The statute of limitations does not in terms apply to suits in equity, but courts of equity are regarded as within the spirit and meaning, so that where remedies are concurrent at law and in equity, the statutory limitations are applied to proceedings in equity as well as at law" see also Sec. 430; *Wood*, *Limitation of Actions* (4th ed. 1916), Sec. 58. "Courts of equity, although not in all cases bound by the statute of limitations, unless expressly brought within its provisions have nevertheless acted in this respect in analogy to courts of law, and given effect to the statute in all cases of concurrent jurisdiction; and it may be said that in such cases a court of equity will no more disregard the statute than a court of law."

<sup>18</sup> 15 N. Y. 505 (1857).

<sup>19</sup> In *Hurlbert v. Clark*, 128 N. Y. 295, 28 N. E. 638 (1891) plaintiff sought to foreclose a mortgage on property after the action on the debt was barred. A foreclosure decree was granted, the Court holding that when the security for a debt is a lien on property the lien is not impaired because the remedy for the recovery of the debt is barred. Commenting upon the decision

lowed.<sup>20</sup> It would seem that the better rule, in accord with general equitable principles, would be to permit one to secure a lien in equity though the debt be barred at law.

The situation is further complicated by the frequent recurrence of the instance in which a cause of action in equity is brought for an accounting in situations where the sole aim of the plaintiff is to recover a sum of money retained or held by the defendant and where the complete relief desired by the plaintiff could be had in an action for debt, and by the further fact that a court of law cannot enter a decree ordering an accounting. In such cases it might be said that the actual accounting is merely incidental to the relief sought by the plaintiff, namely, the collection of a fixed sum due the plaintiff, and hence governed by the law period of limitation. Yet such an action is deemed an equitable one and therefore the equity and not the law period of limitation prevails.<sup>21</sup>

Again, where the defendant is a trustee either *ex maleficio* or of an express trust, it would seem that there is always jurisdiction in equity to compel the performance of the trust in spite of the fact that the whole action to be performed by the trustee is the mere payment of money. Yet even in such cases there is some doubt about the application of sec. 53 of the Civil Practice Act.

In an action brought by a client against a firm of lawyers for money converted by one of the members of the firm without the knowledge of the others but deposited in the firm bank accounts, the Court had before it a situation of

in *Borst v. Corey, Earl, J.*, at 300, 28 N. E. at 639 stated: "The reasoning by which the result was reached in that case is not altogether satisfactory\*\*\*."

<sup>20</sup> *Plet v. Wilson*, 134 N. Y. 139, 31 N. E. 336 (1892). In this case the Court stated that the plaintiff's remedies were either in ejectment, to recover possession of the property or, if he affirmed the contract, he had a choice of two remedies, 1. to recover back the balance of the purchase price or "2. A suit in equity to foreclose the contract. Whether the vendor should elect to enforce the collection of his debt through a personal judgment against his vendees or by means of a foreclosure and sale of the property, his action would be on the contract which the vendees had failed to perform. Sections 380 and 382 of the Code of Civil Procedure provide that an action upon a contract, obligation or liability, express or implied, except a judgment or sealed instrument must be commenced within six years after the cause of action has accrued."

<sup>21</sup> See cases *supra* note 9.

a kind here discussed.<sup>22</sup> The case is extremely difficult to understand. On the one hand the Court states as a fact that the defendants received no benefit from the money which was converted by one of their partners.<sup>23</sup> And on the other hand the Court holds that the action is for money had and received and in the nature of unjust enrichment.<sup>24</sup> Of course it is impossible to see how anybody can be enriched by money or property from which he has no benefit whatsoever. The Court also states as a settled principle of law that where an agent receives a sum of money from his principal for specific purposes he is a debtor and not a trustee.<sup>25</sup> This is of course directly contrary to well established principles and renders the case defiant of classification.<sup>26</sup> As a ruling however on the statute of limitations, it is interesting in that the Court strips the complaint of all the equitable relief demanded therein and concludes that since a cause of action at law would have provided the plaintiff with all the relief that he sought or procured in the action in equity, the case is governed by the six-year statute. On the whole it would seem that the courts have pressed the Statute of Limitations in every case where the relief sought by the plaintiff might have been obtained in a court of law in spite of the fact that a valid cause of action in equity also existed.

## (2) ACTIONS IN EQUITY UNAFFECTED BY THE STATUTE OF LIMITATIONS.

In spite of the fact that the courts have said that section 53 applies to all cases in equity, there are a number of equitable actions which are permitted to be brought even

<sup>22</sup> Model Building & Loan Assn. v. Reeves, 236 N. Y. 331, 140 N. E. 715 (1923).

<sup>23</sup> *Ibid.* at 336, 140 N. E. at 716.

<sup>24</sup> *Ibid.* at 338, 140 N. E. at 717.

<sup>25</sup> *Ibid.* at 339, 140 N. E. at 718.

<sup>26</sup> 2 Perry on Trusts and Trustees (7 ed., 1929) Sec. 206. "The relation of principal and agent is a fiduciary one, and the same observations apply as to other relations of trust and confidence. [The agent is under the same duty as a trustee not to attempt personal gain directly or indirectly by purchasing or dealing with his principal's property. He becomes a constructive trustee when, in violation of his duty to his principal, or by misusing the latter's funds, he purchases real estate for himself]."

though more than ten years have elapsed since the right to bring the action has accrued. Reference is made to instances like an action to remove a cloud on title.<sup>27</sup> It is said that this is a cause of action which is constantly accruing and hence the statute of limitations could never bar it. Yet an action to quiet title by one out of possession of the real property has been held to be barred by the passage of the ten-year period.<sup>28</sup> The justice of this distinction will not be questioned. It will be more difficult however to subsume it under the general principles enunciated by the courts.

An action to quiet title, when it is brought by one in possession is ordinarily purely formal and is instituted for the purpose of clearing the record rather than for the purpose of establishing rights. As such it will frequently not be vigilantly pressed, the party having the right to maintain it being of no practical urgency to do so. On the other hand, when the plaintiff is out of possession, the action is frequently preliminary to another action to regain possession and consequently involves consideration of substance rather than form. Nevertheless if the dictum of the court<sup>29</sup> that section 53 covers all equitable actions is strictly applied, it will be difficult to explain these cases.

In a similar class are the cases giving the relief of injunction against a continuing trespass or nuisance.<sup>30</sup> Here the cause of action is said not to be barred until the period of prescription has raised the presumption of a grant to

<sup>27</sup> *Miner v. Beekman*, 50 N. Y. 337 (1872); *Peo. ex rel. Townshend v. Cody*, 50 Super. Ct. 394 (N. Y. 1884) *aff'd* 99 N. Y. 620 (1884); *M. L. Ins. Co. v. Corey*, 135 N. Y. 326, 31 N. E. 1095 (1892); *Dooley v. Procter & Gamble Mfg. Co.*, 158 App. Div. 429, 143 N. Y. Supp. 650 (2nd Dept. 1913).

<sup>28</sup> *German Savings Bank v. Wagner*, 164 App. Div. 234, 149 N. Y. Supp. 654 (1st Dept. 1914).

<sup>29</sup> *Supra* note 7.

<sup>30</sup> *Galaway v. Met. El. Rwy. Co.*, 128 N. Y. 132 at 143, 28 N. E. 479 at 481 (1891). "The questions raised are answered by elementary principles established in this state by numerous reported cases. They are found in the two propositions that continuous injuries to real estate caused by the maintenance of a nuisance or other unlawful structure create separate causes of action barred only by the running of the statute against the successive trespasses, and the further principle that no lapse of time or inaction merely on the part of the plaintiff during the erection and maintenance of such structure, unless it has continued for the length of time necessary to effect a change of title in the property claimed to have been injured, is sufficient to defeat the right of the owner to damages."

the defendant. Again the courts indulge in a polite fiction that the maintenance of the nuisance renders a cause of action to enjoin it a constantly accruing one and hence it cannot be barred by the statute. Less can be said for the merits of this exception than for the prior one for it would seem that a period of ten years is ample time for an individual to decide to institute an action to enjoin a continuing trespass or nuisance, and again, these cases are not to be reconciled with the proposition that section 53 covers all equitable actions.

Similarly, the rights of a *cestui* against the trustee of an express trust are not barred by section 53 of the Civil Practice Act.<sup>31</sup> Here again the relationship being a continuing one, the courts suggest that the cause of action accrues from time to time. It must appear however that the defendant is not a trustee *ex maleficio* or trustee by implication, for in such case the statute begins to run from the time the wrong was committed.<sup>32</sup>

### (3) FRAUD AS AN ELEMENT IN TOLLING THE STATUTE.

Where an action is predicated on a fraud practiced on the complaining party the Civil Practice Act provides that the Statute of Limitations does not begin to run until the discovery by the injured party of the facts constituting the fraud.<sup>33</sup> While that provision was not re-enacted as part of section 53 it has nevertheless been held to apply thereto and a cause of action in equity for fraud is not barred until the expiration of the ten-year period of limitation.<sup>34</sup> The insistence, however, that the fraud allowed must be actual and not constructive fraud<sup>35</sup> would seem to be open to serious criticism inasmuch as constructive fraud is a name fre-

<sup>31</sup> *Decouche v. Savetier*, 3 Johns. 190, 216 (N. Y. 1817); *Kane v. Bloodgood*, 7 Johns. 90 (N. Y. 1823); *Ward v. Smith*, 3 Sandf. 592 (N. Y. 1846).

<sup>32</sup> *Ibid.* and also *Lannier v. Stoddard*, 103 N. Y. 672 (1886).

<sup>33</sup> At law, formerly, a cause of action based on fraud began to run from the date of perpetration of the fraud. *Miller v. Wood*, 116 N. Y. 351, 22 N. E. 553 (1889). But in equity the period of computation was measured from the time plaintiff knew of the facts constituting the fraud until the period of limitation passed. *Schenck v. State Line Telephone Co.*, 238 N. Y. 308, 144 N. E. 592 (1924).

<sup>34</sup> *Schenck v. State Line Telephone Co.*, *supra* note 33.

<sup>35</sup> *Spallhotz v. Sheldon*, 158 App. Div. 367, 143 N. Y. Supp. 417 (3rd Dept., 1913).

quently given to conduct regarded as fraudulent in equity though not at law. And if the provisions with regard to fraud are meant to cover equitable as well as legal actions,<sup>36</sup> and if section 53 applies to equitable actions, it would seem to follow that the provision as to legal fraud should also extend to equitable fraud on familiar canons of construction. Yet, obviously, the current of authority is the other way.<sup>37</sup>

It may be said that the courts are given to a more flexible standard of time limitation when the cause of action is based on fraud since it first decides at what time the plaintiff became aware of the fraud practiced on him. And with a variance of facts peculiar to each cause the court is at liberty to determine at what time the cause of action first accrued. It is reasonable to conclude that the rule is a necessary one under the circumstances and while it does not give vent to greater predictability as to the determination of the existence of a cause of action it does accomplish justice in the ordinary instance.

#### (4) THE ACCRUAL OF THE CAUSE OF ACTION.

Since section 53 bars the cause of action within ten years from the date of its accrual, the courts have a weapon whereby the period within which to bring an action may be limited or extended by a decision fixing the date of the accrual of the cause. It would seem that the date of the accrual of the cause of action of the plaintiff is a matter of simple determination, but it is submitted that no systematic rules can be gleaned from the cases. Thus it has been held that an action by one joint debtor to charge the other for his portion of the joint debt paid pursuant to a judgment accrues at the entry of the original judgment against the joint debtors<sup>38</sup> and on the other hand it has

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<sup>36</sup> *Schenck v. State Line Telephone Co.*, *supra* note 33 at 310, 144 N. E. at 592. "In Equity the right of action accrues upon the discovery of the facts constituting the fraud."

<sup>37</sup> *Supra* note 35.

<sup>38</sup> *Hofferberth v. Nash*, 191 N. Y. 446, 84 N. E. 400 (1908). At 446, 84 N. E. at 401 *Bartlett, J.*, stated: "\* \* \* the plaintiff's cause of action does not accrue until the recovery of the original judgment. It does then accrue, however, *co instante* and from that moment it is within the plaintiff's power \* \* \* to charge the property of the unserved joint debtor. I can see no escape from

been held that an action in equity to recover stock stolen from a pledgee and sold to the defendant does not accrue until the plaintiff learns that the stock is in the possession of the defendant.<sup>39</sup> In the former case, the plaintiff is barred if he has made no move for ten years to recover his share of judgment. In the latter case, the plaintiff will never be barred, unless he has first learned of the wrong done to him. The inconsistency between the principles applied in the respective cases referred to indicates how elastic the statute of limitations may become in its practical application.

In the celebrated case of *Rhineland v. Farmer's Loan and Trust Co.*,<sup>40</sup> a cause of action by bondholders against a trustee under a trust indenture was held to be barred under section 388 of the Code of Civil Procedure.<sup>41</sup> The court in the very elaborate opinion which detailed the duties and liabilities of trustees under trust indentures came to the conclusion that a cause of action accrued against the trustee. It was held however, that the trustee had breached not express duties but implied duties, and that hence the Statute of Limitations ran against the cause of action from the date of its accrual. The pivotal point of the case, however, is the determination of this date, a point which is somewhat elided in the lengthy opinion of the Court. It was held in that case that the cause of action accrued not on the date of the wrongful acts of the trustee but rather on the date of the issuance of the bonds by the trustee. This effectively barred the plaintiff's cause of action, and the opinion reads as a lecture to trustees generally on the manner in which they should conduct their trusts. One feels that the Court in administering its discipline is saying to the trustees in effect, we will not hold you liable in this case, but we are indicating to you that in the future you must conduct yourself along different lines. From the point

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the conclusion that the ten years' Statute of Limitations then begins to run against him, and if he allows that period to pass without commencing suit his right to sue is gone."

<sup>39</sup> *Treadwell v. Clark*, 190 N. Y. 51, 82 N. E. 505 (1907) *aff'd* 114 App. Div. 493, 100 N. Y. Supp. 1 (1st Dept. 1906).

<sup>40</sup> 172 N. Y. 512, 65 N. E. 499 (1902).

<sup>41</sup> Now Civil Practice Act, Section 53, see *supra* note 6.

of view of a determination as to the date of the accrual of a cause of action this decision appears to be a very unsatisfactory one.

Reference to cases wherein the relief sought is an accounting between partners<sup>42</sup> or where some other fiduciary relationship<sup>43</sup> is established is appropriate here. In *Gilmore v. Ham*,<sup>44</sup> plaintiff sought an accounting from a liquidating partner. The decisive point in the case was the Court's decision as to when the cause of action accrued in plaintiff's favor. The rule there set forth was that the right of action for an accounting accrued when the liquidator, under the circumstances of the particular case, has had a reasonable time within which to perform his duty, when it ought to have been fully completed and when the liquidator is in fault if it is not. It is obvious that such a rule is at best extremely indefinite and will undoubtedly result in uncertainty of application. Indeed, cognizant of the extreme indefiniteness of such a test, Finch, *J.*, for the court stated, "I should be glad if it were possible to adopt some more definite rule than the one I have stated, but only specific legislation can give us that."<sup>45</sup>

A remarkable decision of the Appellate Division in the First Department in the case of *Small v. Sullivan*<sup>46</sup> has thrown the whole matter of limitations in equity into a state of confusion. In that case the Court applied to an action in equity the ten-year period of limitation prescribed by section 53, and said:

"We take the view expressed at Special Term that the ten-year statute of limitations applies, and as stated in the opinion there filed, that 'the period of limitation begins to run from the date when the plaintiffs' alleged loss was ascertained and computable.'"<sup>47</sup>

<sup>42</sup> See cases collected, *supra* note 9.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Supra* note 9.

<sup>45</sup> *Ibid.* at 9, 36 N. E. at 828.

<sup>46</sup> 218 App. Div. 612, 219 N. Y. Supp. 34 (1st Dept. 1926) *mod'f'd* (on another point) 245 N. Y. 343, 157 N. E. 261 (1927).

<sup>47</sup> *Ibid.* at 622, 219 N. Y. Supp. at 44.

The difficulty with this pronouncement is of course obvious. Section 53 expressly states that the period of limitation begins to run on the date of the accrual of the action. If fraud is alleged, then perhaps the statute does not begin to run until the plaintiff learns of the fraud. Nowhere does the statute provide that the period of limitation begins to run from the date when the loss is ascertained and computable. That was an action by bondholders to recover from directors for a wrongful distribution of the assets of the corporation by way of dividends to its stockholders. The action accrued of course when the distribution was made, and the statute, if section 53 applies, began to run on that date. To postpone it to a later date would seem to be to ignore the entire statute while retaining the period of limitation prescribed therein. There is no legislative warrant for the dictum pronounced by the Court and it is submitted that it is contrary to holdings of the Court of Appeals in similar cases. Nevertheless, the case stands as an unreversed determination of an appellate tribunal and is a standing source of confusion to lawyers and litigants. It is impossible to reconcile it with any known principles involved in the decisions applying the Statute of Limitations in equity, for if it be said that the Court is proceeding on judicial and non-statutory grounds, the ten-year period is entirely without precedent. We have heretofore demonstrated that aside from statute, causes of action in equity are without definite limitation.

#### CONCLUSION.

To the uninitiate, it would seem that the regulation of the periods of time within which actions must be brought is a particularly fertile field for the enactment of rules which might be codified by legislation. However true this may be with regard to causes of action at law, we have seen that at least in equity the attempt to do so has broken down in practice. A not negligible series of cases dictate the conclusion that courts of equity even with regard to matter of this type, find it impossible to submit to the fetters of legislation. In spite of the fact that principles of equity tend to crystallize, it nevertheless remains true that through

the process of equitable jurisprudence courts of law in common law countries are constantly taking cognizance of those individual differences which are ever appearing and which must be considered if the administration of justice is to be elastic and satisfactory. We must overcome here, as elsewhere, the desire to be completely mathematical about any branch of law. Human relations cannot be tabulated or fixed for all time by formulae worked out with a slide-rule. Play must be given to the joints of a machine. And even when we are dealing with matters specially amenable to rules of law, these considerations are of the utmost importance. Long ago, Dean Pound pointed out the fact that law consists of many other ingredients besides rules.<sup>48</sup> The standards and policies of the law have always been felt to be the realm within which judicial discretion and individual justice is worked out. But many lawyers have generally been under the impression that in the sphere of *rules*, some kind of mathematical precision is possible. We have seen how in the difficult matter of limitations of actions, the hope has not been fulfilled and that even here judicial decision must grope with problems of policy and take into account facts and circumstances which cannot be subsumed under fixed classifications or mathematical calculations.

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<sup>48</sup> Pound, *Administrative Application of Legal Standards* (1919), 44 A. B. A., 454; "But in truth a modern legal system is much more complex. We have rules, in the sense in which a real-property lawyer thinks of them, but we have much besides; and I venture to think we shall understand the matter much better by distinguishing rules, principles, conceptions and standards. This may seem unduly complex. But life, which law is to govern, is a complex thing, and modern law requires and possesses a diversity of instruments for the purpose."