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Limitation of Actions—Implied Warranty "Contract" Action Held Barred by Injury to Property Statute of Limitations

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however, that the decision does not go beyond the scope of the doctrine as it existed heretofore, but rather serves to clarify the nature of last clear chance.

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LIMITATION OF ACTIONS — IMPLIED WARRANTY "CONTRACT" ACTION HELD BARRED BY INJURY TO PROPERTY STATUTE OF LIMITATIONS

More than three years after plaintiff's dwelling house had been levelled by an explosion of waterproofing material he had purchased from the defendant, the plaintiff brought this action for damages for injury to his property. The complaint contained two causes of action, one of which was framed in contract and predicated on a breach of warranty theory. The motion to dismiss set up the three year statute of limitations applicable to actions for damages for injury to property, New York Civ. Prac. Act § 49(7). The plaintiff in opposition to this motion, contended that the six year statute applying to contract actions should govern. N. Y. Civ. Prac. Act § 48(1). *Held:* An action for consequential damages to property, whether the action is brought in contract or in tort, is an action for injury to property within the three year statute of limitations. Motion of defendant granted. *Buyers* v. *Buffalo Paint & Specialties, Inc.*, 99 N. Y. S. 2d 713 (Sup. Ct. Erie County 1950).

By Chapter 588 of the Laws of 1936 §§ 48 and 49 were amended, subd. 7 being added to § 49, cutting down the applicable period of limitations for actions for damages for injury to property from six to three years. Section 49 in part states: "The following actions must be commenced within three years after the cause of action has accrued . . . (7) An action to recover damages for an injury to property, except in the case where a different period is expressly prescribed in this article . . ." It will be noted that this statute does not draw a distinction in terms between actions in tort and actions in contract.

Warranty actions are commonly cast in the form of an action in contract. There must be privity of contract in an action for breach of warranty. *Ryan* v. *Progressive Grocery Stores*, 255 N. Y. 388, 175 N. E. 105, 74 A. L. R. 339 (1931). The negligence of the defendant is immaterial. *Rinaldi* v. *Mohican Co.*, 171 App. Div. 814, 157 N. Y. S. 561 (3d Dept. 1916), *aff'd*, 225 N. Y. 70, 121 N. E. 471 (1918). General Construction Law § 25-a states: "Injury to property is an actionable act, whereby the estate of another is lessened, other than a personal injury or the breach of contract." Injury to property refers to actions grounded in tort, such as trespass or waste. *Confreda* v. *George H. Flinn Corp.*, 68 N. Y. S. 2d 925 (Sup. Ct. 1947). The definition of injury to property, § 25-a, is applicable to the Civil Practice Act. General Construction Law, § 110, Report of Joint Legislative Committee, 34 (1919). But cf.

Schiavone-Bonomo v. *Buffalo Barge Towing Corp.*, 132 F. 2d 766 (2d Cir. 1942), *cert. denied*, 320 U. S. 649, 64 S. Ct. 53, 88 L. Ed. 445 (1943), holding that the General Construction Law has not applied to the Civil Practice Act since 1920.

The court in the case at bar reasons that the exclusionary words, contained in § 25-a, must be read as referable to actionable wrongs which constitute solely breaches of contract and which do not have any tortious aspects. Since plaintiff seeks consequential damages the action sounds in tort. *Buyers* v. *Buffalo Paint & Specialties, Inc., supra.* "Even today, an action for breach of warranty is, in some respects, an action in tort," but "the distinction between torts and breaches of contract is oft-times so dim and shadowy that no clear line of delineation may be observed." *Greco* v. *S. S. Kresge Co.*, 277 N. Y. 36, 12 N. E. 2d 557, 115 A. L. R. 1020 (1938). Support for the court's utilization of such a fine distinction may be found in legislative policy. Although fraught with inconsistencies, the prevailing policy has been the reduction in time within which causes of action must be brought. .Cognizant of this policy, the court in the case at bar applied the shorter of the two applicable periods of limitation. Moreover the decision is supported by the method of interpretation adopted in New York; that is, in applying the statute of limitations the form of the complaint, whether *ex contractu* or *ex delictu*, is immaterial, the character of the loss being determinative. *Webber* v. *Herkimer & Mohawk St. R. R.*, 109 N. Y. 311, 16 N. E. 358 (1888), cited as controlling in *Loehr* v. *East Side Omnibus Corp.*, 259 App. Div. 200, 18 N. Y. S. 2d 529 (1st Dept. 1940), *aff'd*, 287 N. Y. 670, 39 N. E. 2d 290 (1941).

Although not presented in the case, an important problem suggested by the facts is the time when the cause of action accrues. An action for breach of warranty is generally deemed to have accrued upon the date of sale, and the action is barred six years from that date. *Liberty Mutual Ins. Co.* v. *Sheila Lynn, Inc.*, 185 Misc. 689, 57 N. Y. S 2d 707 (1st Dept. 1945), *aff'd*, 270 App. Div. 835, 61 N. Y. S. 2d 373 (1st Dept. 1946). In the principal case, the source of the action is breach of warranty, but because of the consequential damages the action is said to sound in tort; therefore the three year period of limitations is applicable. It might be argued that because of the source of the action the limitation period begins running from the date of the sale and is barred three years from that date. This, however, would be wholly inconsistent with the court's applying § 49(7) to the action, because in determining the applicable period of limitations the court disregards the source of the action and makes the damages sustained the predominant test. Yet in determining the accrual of the cause of action the court, according to this theory, would have to reverse itself, disregard the damages sustained and make the source of the action the determining factor.

A second theory might be that the cause of action does not accrue until the damages are sustained. Under such a theory, injury to property would be the

predominant test in determining the applicable period of limitations and the date of accrual of the cause of action, thus satisfying the demands of consistency and also preventing a party from finding himself in the position of having his action barred before he knows of the breach. However in New York the liability of the wroug, for breach of warranty, arises on the date of sale, *Liberty Mutual Ins. Co.* v. *Sheila Lynn, Inc., supra,* and "except in cases of fraud where the statute expressly provides otherwise, the statutory period of limitations begins to run from the time when liability for the wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury." *Schmidt* v. *Merchants Despatch Trans. Co.,* 270 N. Y. 287, 200 N. E. 824, 104 A. L. R. 450 (1936).

Finally, a third theory might be that, since the action has a dual aspect, suit must be brought within six years from the date of sale or three years from the date of injury whichever is the shorter of the two periods.

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LABOR LAW — DISCRIMINATION BY UNION SEEKING UNION SHOP ON BASIS OF SEX HELD "UNREASONABLE"

Defendant unions picketed plaintiff's tavern to induce acceptance of a union shop. Plaintiff was willing to comply, and her employees were willing to join the unions. But three of plaintiff's bartenders were women and the bartenders' union strict policy was to admit only male bartenders to membership. Thus, compliance with the union's demand would require plaintiff to discharge, or at least take from behind the bar, the three barmaids. *Held:* injunction restraining picketing of plaintiff's establishment granted, "unless the defendant unions agree, in the alternative, either to admit the barmaids presently employed by the plaintiff . . ., or to modify their demand for a union shop, so as to exempt the barmaids now employed by the plaintiff from the requirement that all the plaintiff's employees be or become members of defendant unions." *Wilson* v. *Hacker,* 101 N. Y. S. 2d 461 (Sup. Ct. 1950).

It has become well established during the past two decades that at least in respect to employees at the time the union contract is entered into, a union cannot demand a closed shop while at the same time maintaining an arbitrarily closed union. *Clark* v. *Curtis,* 273 App. Div. 797, 76 N. Y. S. 2d 3 (1947). The principle has been justified in various ways, the first of these theories being that of a principal-agent relationship. A union is required to act as exclusive bargaining agent for all the employees in a given bargaining unit [see N. Y. Labor Law § 705(1) and N. L. R. A. § 9a] and therefore must represent each employee fairly and impartially. Any arbitrary conduct or discrimination on the part of the union which would deprive any of the employees who are will-