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# Civil Procedure And Evidence—Statute of Limitations—Constructive Trust

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benefit of its members or for the people of the state generally.[13] The decision, in the words of the court, is another in the liberal trend permitting associations or corporations to champion constitutional rights.[14]

## Statute of Limitations—Constructive Trust

In a suit by a wife against her husband to impress a constructive trust on a house for which she allegedly paid part of the consideration in reliance on husband's promise to place title in both names, the court, unanimously affirming the Appellate Division and Special Term, *held,* the cause of action was barred by the statute of limitations because wife brought suit more than ten years after husband placed title in his own name. There was no estoppel, notwithstanding husband's subsequent oral promises to place title in both names.[15]

An action to impress a constructive trust is governed by the ten year statute of limitations.[16] This is not questioned[17] and has long been recognized.[18] The court in the instant case applied the well settled rule that where an action is instituted against a trustee ex malificio or by implication or construction of law the statute begins to run from the time the wrong was committed by which the party became chargeable in equity as trustee.[19] It again answered in the negative[20] the question of whether the doctrine of estoppel may be invoked to give effect to parol representations or promises in the face of the statute requiring a written acknowledgment or promise to establish a new or continuing contract.[21] They also found the statute of limitations is not tolled merely because the parties are husband and wife.[22]

On the ground that an extension is without support in authority, logic, or policy, the Court refused to extend to this case the equity doctrine that the statute

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13. *United Press Ass'n. v. Valente,* 308 N. Y. 71, 123 N. E. 2d 777 (1955); *Association for Protection of Adirondacks v. MacDonald,* 253 N. Y. 234, 170 N. E. 902 (1930). (Although this issue was not raised in this case, the court felt there was no compelling reason why they should not adhere to the practice followed in the case.)

14 *Pierce v. Society of the Sisters,* 268 U. S. 510 (1925); *Joint Anti-fascist Refugee League Comm. v. McGrath,* 341 U. S. 123 (1950).

15. *Scheuer v. Scheuer,* 308 N. Y. 447, 126 N. E. 2d 555 (1955).

16. C. P. A. §253.

17. *Geller v. Schulman,* 110 N. Y. S. 2d 862, *aff'd* 280 App. Div. 933, 115 N. Y. S. 2d 824 (2d Dep't 1952).

18. Cf. *Higgins v. Higgins,* 14 Abb. N. C. 13 (1883).

19. *Lammer v. Stoddard,* 103 N. Y. 672, 9 N. E. 328 (1886).

20. *Shaply v. Abbott,* 42 N. Y. 443 (1870).

21. Civil Practice Act §659.

22. *Dunning v. Dunning,* 300 N. Y. 341, 90 N. E. 2d 884 (1950).

of frauds may not be raised as a bar to granting relief by way of constructive trust against unjust enrichment accomplished by abusing a confidential relationship.[23]

## Charge Limiting Use of Evidence

The Court of Appeals, in an action to recover brokerage commissions, held, receipt in evidence of broker's unsuccessful efforts to sell property was not only immaterial but in this case prejudicial error which was not cured by the trial court's belated charge to limit the use of such evidence to corroboration.[24]

The rule of substantive law that a broker can not recover for his unsuccessful efforts is basic.[25] The rule of adjective law upon which this case was decided must by its very nature depend in its application upon the facts of the individual case. There is, however, ample precedent for its use. An early case[26] in referring to this rule, said the effect of prejudicial evidence is not obviated by the judge's direction to disregard it. This principle was again enunciated when the court on the basis of the above decision held that the reception of this type of evidence was error which was not cured by the charge.[27] Again, in 1943, the Appellate Division said, "In our opinion it may not be said that the hearsay statements . . . were harmless because the court instructed the jury to disregard them."[28] The rule as applied in these cases depends in the main on whether the court in its discretion feels there is a need for it.

## Lis Pendens

Where plaintiff had filed a summons, complaint and notice of pendency of action in county court, but had not served any defendant within sixty days after filing,[29] plaintiff was not entitled after cancellation of the notice to file another.[30]

The filing of lis pendens is a privilege[31] granted by statute.[32] Although other

23. *Wood v. Rabe*, 96 N. Y. 414 (1884); *Goldsmith v. Goldsmith*, 145 N. Y. 313, 39 N. E. 1067 (1895).
24. *Fred W. Hoch Assoc. v. Western News U.*, 308 N. Y. 461, 126 N. E. 2d 749 (1955).
25. *Sibbald v. Bethlehem Iron Co*, 83 N. Y. 378 (1881).
26. *Erbin v. Lorillard*, 19 N. Y. 299 (1859).
27. *Arthur v. Griswald*, 55 N. Y. 400 (1874).
28. *Greenberg v. Prudential Ins. Co. of America*, 266 App. Div. 685, 40 N. Y. S. 2d 494 (2d Dep't, 1943).
29. Civil Practice Act §120.
30. *Israelson v. Bradley*, 308 N. Y. 511, 127 N. E. 2d 313 (1955).
31. *Cohen v. Biber*, 123 App. Div. 528, 108 N. Y. Supp. 249 (2d Dep't 1908).
32. Note 1, *supra*.