IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
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CLARENCE BOREL

VS.

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL

CIVIL ACTION NO. 6449

BRIEF ON THE POINT THAT THE CAUSE OF ACTION ASSERTED BY PLAINTIFF IS BARRED BY THE TWO YEAR STATUTE OF LIMITATION OF THE STATE OF TEXAS, AND BY THE ONE YEAR STATUTE OF THE STATES OF CALIFORNIA AND LOUISIANA

BRIEF FILED IN BEHALF OF
ALL DEFENDANTS OF RECORD

GEO. A. WELLER, OF COUNSEL

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TO THE HONORABLE JUDGE OF SAID COURT:

The defendants, and each of them, present this brief to the Court on the propositions that the plaintiff's cause of action, if any, is barred by the two (2) year statute of limitation of the State of Texas; is barred by the one (1) year statute of limitation of the State of Louisiana; the one (1) year statute of limitation of the State of California; and is barred by the statutes of limitation of each state where the cause of action, if any, arose. The statute of limitations of Texas which will bar an action for personal injury is Article 5526, Vernon's Annotated Civil Statutes of Texas, which provides:

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"Actions to be commenced in two years

"There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

"6. Action for injury done to the person of another.

"7. Action for injury done to the person of another where death ensued from such injury; and the cause of action shall be considered as having accrued at the death of the party injured."

A copy of this statute is attached as an exhibit to this brief.

Article 4671, Revised Civil Statutes of Texas, "Cause of Action From Injuries Resulting in Death," provides:

"An action for actual damages on account of the injuries causing the death of any person may be brought in the following cases:

"1. When an injury causing the death of any person is caused by the wrongful act, neglect, carelessness, unskillfulness, or default of another person, corporation, etc., such person, corporation, etc., shall be liable in damages for the injury causing such death."

A death action in Texas is a creature of statute and is not derived from common law. Francis v. Herrin Transportation Company, Tex. Civ. App., 1968, 423 S.W. (2d) 610, reversed on other grounds, 432 S.W. (2d) 710. An action for wrongful death did not exist at common law. Norman v. Mustang Aviation, Inc., Sup. Ct. Tex., 1968, 430 S.W. (2d) 182.

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A statutory beneficiary suing under the Texas wrongful death statute can recover only if the deceased, had he lived, could have recovered. Wentzel v. Neurenberg, Civ. App., 314 S.W. (2d) 855; Childs v. Childs, Tex. Civ. App., 107 S.W. (2d) 703.

Where the cause of action in behalf of the decedent is barred by the statute of limitation, the cause of action for death resulting from the same accident is likewise barred by limitation.

The general rule in Texas is that in negligence or breach of warranty cases resulting in personal injury, the cause of action accrues from the time of the negligent act or omission. Blondeau v. Summers, Civ. App. Tex., 1940, 139 S.W. (2d) 223, error refused; Robertson v. Texas & New Orleans Railroad Company, Tex. Civ. App., 1939, 122 S.W. (2d) 1098; Tennessee Gas Transmission Company v. Fromme, Tex. Sup. Ct., 1954, 153 Tex. 352, 269 S.W. (2d) 336; 37 Tex. Jur. (2d), Para. 63, Page 187; and Para. 93, Page 241.

In Tennessee Gas Transmission Company v. Fromme, supra, the Texas Supreme Court holds that a cause of action accrues when injury is sustained; but if the act of which injury was a natural sequence was a legal injury, that is, an injury giving a cause of action by reason of its being an invasion of plaintiff's rights,

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then, however slight the damage, limitation will run from the time the wrongful act was committed, and will bar an action for any damage resulting from the act, even though such damage may not have been fully developed until within a period less than necessary to complete the bar.

Again, the rule is stated in Robertson v. Texas & New Orleans Railroad Company, 122 S.W. (2d) 1098, error refused, that ordinarily where injury, though slight, is sustained in consequence of the negligent act of another, the statute of limitations attaches at once, and the running of the statute is not postponed by the fact that actual or substantial damages do not occur until a later date. In this case, it appeared that plaintiff had suffered some injury and pain at the time of accident and periodically thereafter, notwithstanding that he did not become aware of the extent of his injuries until within two years of filing suit, which was filed more than four years after the accident.

Cases from other jurisdictions support the rule that plaintiff's cause of action accrues from the date of occurrence, negligence or wrong, even though the disease results long after the exposure. Field v. Gazette Publishing Company, 1933, 187 Ark., 253, 59 S.W. (2d) 19, case involving lead poisoning; Barksdale v. Silica Products Company, 1940, 200 Ark. 32, 137 S.W. (2d) 901 (silicosis); Schmidt v. Merchants Despatch Transportation

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Company, 1936, 270 N.Y. 287, 200 N.E. 824, 104 A.L.R. 450; Michalek v. United States Gypsum Company (1935), Ct. of App. (2nd) N.Y., 76 F. (2d) 115, reversed on other grounds, 298 U.S. 639, 56 S. Ct. 679; Street v. Consumers Mining Corporation, 1946, 185 Va. 561, 39 S.E. (2d) 271, 167 A.L.R. 886 (silicosis); Scott v. Rinehart & Dennis Company, 1935, 116 W. Va. 319, 180 S.E. 276 (silicosis); Brown v. Tennessee Consolidated Coal Company, Ct. of App., Tennessee, certiorari dismissed by Supreme Court (1935), 83 S.W. (2d) 568; Wiersycki v. Pratt Company, 271 N.Y. Supp. 36.

In Field v. Gazette Publishing Company, 187 Ark. 253, 59 S.W. (2d) 19, in an action by a linotype operator to recover for lead poisoning contracted during his employment with defendant, the contention was made that the three year statute of limitation was in effect tolled or held in abeyance until he or his physician was able to determine the specific malady present. The Court recognized the doctrine that the statute of limitations begins to run from the time the personal injuries are sustained though results may not then be fully developed, and held that the trial judge correctly instructed that if plaintiff "contracted" the malady previous to the three year period immediately prior to the suit the verdict must be for the defendant. The Court then said:

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"As we review the situation, the great weight of American authority is to the effect that the cause of action arises and the statute of limitations begins to run from the date of the negligent act and not from the time the full extent of the injury may be ascertained."

In Scott v. Rinehart & Dennis Company (1935), 116 W. Va. 319, 180 S.E. 276, a case involving a suit for damages as a result of plaintiff contracting silicosis through exposure to certain work which ended in September, 1931, the Court held that an action commenced in October, 1933, was barred by the one year statute of limitation. In this case, it was alleged that the plaintiff did not know and by the use of reasonable care could not have ascertained that he had silicosis until within three months of filing his suit. The Court held that the right of action is to be deemed to accrue when the wrong is committed, and that in the absence of some act of concealment by the wrongdoer the mere ignorance of the injured party of the existence of the actionable wrong will not suspend the statute; and the Court further held that the nature of a silicosis case could not justify the Court in therein departing from the long-established rule. The Court observed that the disease of silicosis was not a recent phenomenon but had long been associated with certain occupations and cited certain New York cases as supporting the doctrine that a cause of action for injuries arises when the injuries are "first inflicted" and that subsequent development of disease therefrom does not give rise to a cause of action.

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In Wiersycki v. Pratt Company, 271 N.Y. Supp. 36, Supreme Court of New York, it was held that the weight of authority is that a cause of action for injuries arises when they are first inflicted, and subsequent development of disease resulting therefrom does not give rise to a cause of action.

In Schmidt v. Merchants Despatch Transportation Company, New York Court of Appeals, 270 N.Y. 287,200 N.E. 824, 104 A.L.R. 450, the plaintiff alleged that while in the employ of defendant he inhaled foreign substances in the form of dust and as a result, contracted a disease of the lungs known as pneumoconiosis. In this case, the plaintiff's employment had ceased three years before the action was commenced. The Court held that any breach of duty owed by the defendant as employer must, then, have been completed before that time and that the cause of action was barred by the statute of limitation. Quotations from this case may be of some assistance to the Court in considering this question. Quotations are from 104 A.L.R. 458, reporting the Schmidt case:

> "We have said that 'in actions of negligence damage is of the very gist and essence of the plaintiff's cause.' Comstock v. Wilson, 257 N. Y. 231, 235, 177 N.E. 431, 432, 76 A.L.R. 676. Accordingly, the plaintiff claims that his cause of action accrued, not at the time he inhaled the dust -- more than three years before the action was commenced -- but at the time when the dust so inhaled, resulted in a disease of the lungs, and that date, it is said, can be determined only by medical testimony.
>
> "Though negligence may endanger the person or property of another, no actionable wrong is committed if the danger

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is averted. It is only the injury to person or property arising from negligence which constitutes an invasion of a personal right, protected by law, and, therefore, an actionable wrong. xxx"

"That does not mean that the cause of action accrues only when the injured person knows or should know that the injury has occurred. The injury occurs when there is a wrongful invasion of personal or property rights and then the cause of action accrues. 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 wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury. Consequential damages may flow later from an injury too slight to be noticed at the time it is inflicted. No new cause of action accrues when such consequential damages arise. So far as such consequential damages may be reasonably anticipated, they may be included in a recovery for the original injury, though even at the time of the trial they may not yet exist. xxx."

"We must apply that rule here. The injury to the plaintiff was complete when the alleged negligence of the defendant caused the plaintiff to inhale the deleterious dust. For that injury, including all resulting damages, the defendant was then liable. The disease of the lungs was a consequence of that injury. Its result might be delayed, or, perhaps, even by good fortune averted; nevertheless, the disease resulted naturally, if not inevitably, from a condition created in the plaintiff's body through the defendant's alleged wrong. It cannot be doubted that the plaintiff might have begun an action against the defendant immediately after he inhaled the dust which caused the disease. No successful challenge could have been interposed on the ground that the action was prematurely brought because at the time it was commenced no serious damage to the plaintiff had yet developed. In that action the plaintiff could recover all damages which he could show had resulted or would result therefrom. In effect, the plaintiff is asking this court to hold that the statutory period of limitation begins only from the time that the plaintiff had reasonable assurance that serious damage had resulted or would result from past injury. The statute provides in unambiguous language that

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the period of limitation begins to run at the moment when right to begin an action accrues. The same test must be applied to a challenge that the action is stale as to a challenge that the action has been brought prematurely.

"The statute of limitations is a statute of repose. At times, it may bar the assertion of a just claim. Then its application causes hardship. The Legislature has found that such occasional hardship is outweighed by the advantage of outlawing stale claims. The problem created by the slow onset of the disease of pneumoconiosis or silicosis has been considered by the courts of other jurisdictions. They have given to statutes of limitation their intended effect as statutes of repose and have held that a cause of action sounding in negligence accrues at the time when through lack of care by an employer, deleterious substances enter the lungs of an employee though the development of consequential damages may be long delayed. xxx"

In Piukkula v. Pillsbury Astoria Flouring Mills Company, Oregon Supreme Court, 1935, 42 P. (2d) 921, 99 A.L.R. 244, we find a suit for death resulting from the inhalation of flour dust which was alleged to be detrimental to the health of the employee when inhaled over a long period of time and calculated to produce pneumonia, asthma and other pulmonary sicknesses, disorders and diseases of injurious character. About September 17, 1930, the plaintiff became weakened and impaired to the extent that he began noticing difficulties in breathing, but his condition did not appear to be serious at that time. His condition was slowly progressive and by January 22, 1933, Piukkula entered the hospital, "which was the first time that plaintiff realized the extent and seriousness of his ailment." He filed suit on June 8, 1933, and died December 14, 1933. The plaintiff recognized the general rule

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that a cause of action for negligence accrues and the statute of limitations begins to run at the time of injury, but contended that when the injury takes the form of an occupational disease the statute does not begin to run until the workman's condition of health becomes so serious that he realizes the extent of his disease. The Court recognized that the great weight of American authority is to the effect that the cause of action arises and the statute of limitations begins to run from the date of the negligent act and not from the time the full extent of the injury may be ascertained. The Court held the action was barred. The Court also commented that on September 17, 1930, Piukkula noticed difficulties in breathing and was aware he was suffering from an ailment of the lungs, although at that time "he did not believe that his condition was serious." In January, 1931, he left the defendant's employ. If anything for which the defendant was responsible occasioned Piukkula's ailment, it must have occurred after his first employment began August 28, 1929, and prior to January, 1931, when his employment ceased.

The Piukkula v. Pillsbury case is likewise authority for the proposition that where the cause of action of the plaintiff, Piukkula, was barred by limitation, no cause of action exists for death under the death statute since the employee's right of action was barred at the time of his death.

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In Dalrymple v. Brunswick Coco-Cola Bottling Company, 51 Georgia Appeals 754, 181 S.E. 597, it was held that the statute of limitation runs from the date when the plaintiff contracted T.B., notwithstanding he was ignorant of having contracted it and did not become aware of having contracted it until some time thereafter when informed by a physician.

Qualification of the General Rule in Texas

The only place that Texas has qualified the rule that a cause of action for negligence is barred by the two year statute of limitation and begins to run from the date of the occurrence is in Gaddis v. Smith, Sup. Ct. Tex. 1967, 417 S.W. (2d) 577, which case recognized the "discovery rule" in a case where plaintiff sued defendant doctors for damages allegedly resulting from leaving a surgical sponge inside the patient's body. The Court re-examined holdings in two prior cases, overruling them, and held that the cause of action for the negligent leaving of a foreign object in a patient's body accrues when the patient learns of, or in the exercise of reasonable care and diligence, should have learned of the presence of such foreign object in his body. The Court also said: "It should be noted that our holding here is limited to causes of action in which a physician leaves a foreign object in the body of his patient." At Page 581, the Court said:

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"It has been argued that the accrual of this cause of action cannot be distinguished from that received by a person in an automobile accident who is apparently uninjured but years later discovers that the slight trauma produced cancer. See dissenting opinion in Berry v. Branner, 421 P. 2d 996, 1001 (Or. Sup. 1966). However, the instant case involves the inability to know of the negligent act of leaving a sponge in the patient's body, while the cancer producing trauma results from the negligent operation of an automobile which act is readily apparent at the moment of impact."

Justice Griffin, in his dissenting opinion, quotes the statute and says: "The statute does not mention discovery of the injury."

The case of Braniff Airways, Inc. v. Curtiss-Wright Corporation, U. S. Court of Appeals, 2nd Cir., 411 F. (2d) 451, held that actions instituted in 1963 and 1964 by airline passengers who were residents of New York, against the manufacturer of an airplane engine which sold the engine in 1956, for injuries suffered in Florida airplane crash on the theory of implied warranty were subject to the New York six year statute of limitation as the cause of action accrued at the time of the sale of the engine. The Court also quoted the Florida law construed in Creviston v. General Motors Corporation, 210 So. (2d) 755, Florida District Court of Appeals, 1968, which held that the period of limitation in an implied warranty action is three years and the action accrues at the time of sale. It is to be noted that in the Braniff Airways, Inc. v. Curtiss-Wright Corporation case, the Court cited the case

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of Schwartz v. Heyden Newport Chemical Corporation, 12 N.Y. (2d) 212, 215, 237 N.Y. Supp. (2d) 714, 716, 188 N.E. (2d) 142, 143, 4 A.L.R. (3rd) 814, modified 12 N.Y. (2d) 1073, 239 N.Y. Supp. (2d) 896, 190 N.E. (2d) 253, certiorari denied 374 U.S. 808, 83 S. Ct. 1697, 10 Law Ed. (2d) 1032 (1963), which involved the sale and use of injurious medication, concerned the date of accrual of a negligence cause of action and implied warranty cause of action; and the New York Court held that the implied warranty action accrued at the time of sale and that the negligence action accrued when the medication was administered. The Court likewise held that the Schwartz holding on implied warranty actions was not affected by the recent New York Court of Appeals four to three decision in Flannigan v. Mt. Eden General Hospital, 24 N.Y. (2d) 427, 301 N.Y. Supp. (2d) 23, 248 N.E. (2d) 871, April, 1969, which holds the same as the Gaddis v. Smith Texas case that in medical malpractice actions for negligence, involving the insertion of a foreign object into a patient's body, the cause of action does not accrue until the object is discovered. The Court in Flannigan discussed Schwartz but was concerned only with its holding regarding the accrual of the negligence action. The Court in Flannigan distinguished Schwartz and clearly limited Flannigan's application to foreign object malpractice cases. This is the same rule that is recognized in Texas.

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There is a line of cases involving an action for damages against a single employer caused by exposure to harmful dust, etc., which hold that the statute of limitation against such an action begins to run from the time of cessation of inhalation of the injurious substances for which defendant was responsible in the case of a disease caused by such exposure. These cases also hold that the statute begins to run when employment terminated and not when the disease appeared, according to an expert's opinion. See the following cases:

Rowe v. Gatke Corporation, 1942 (Ct. of Apps., 7th, Indiana) 126 F. (2d) 61, certiorari dismissed, 317 U. S. 702, 63 S. Ct. 81; Michalek v. United States Gypsum Company (Ct. of Apps., 2nd Cir., 1935), 76 F. (2d) 115; Goodall Company v. Sartin, 1944 (Ct. of Apps., 6th, Tennessee), 141 F. (2d) 427, certiorari denied, 65 S. Ct. 34, (period began from time of cessation of the overt acts constituting the continuing wrong); LaPorte v. United States Radium Corporation, 1935 (District Court, New Jersey), 13 F. Supp. 263, New Jersey law -- at the latest limitation began from the last day of exposure to the elements causing the disease; Ligrecke v. E. I. DuPont de Nemours & Company, 1942 (District Court of New York), 46 F. Supp. 266 -- limitation ran from cessation of the inhalation of injurious substances causing disease; Washington-Henson v. Dept. of Labor & Industries (1942)

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15 Wash. (2d) 384, 130 P. (2d) 885; Maty v. Grasselli Chemical Company, (1937, C.A. 3rd N.J.), 89 F. (2d) 465 -- that the statute began to run at time of cessation of exposure to the dust.

In Michalek v. United States Gypsum Company (Ct. of Apps., 2nd Cir. 1935), 76 F. (2d) 115, the complaint pleads a cause of action based on negligent failure of appellee to provide proper safeguards and appliances to protect plaintiff from dust generated at the place of employment, plaintiff contracting pneumoconiosis, pulmonary fibrosis and other diseases. New York had a three year statute of limitation. The Court said:

> "The negligence claimed in the first cause of action occurred during his service. The statute began to run when he left, and he had three years thereafter to sue. After this lapse, the action was barred. xxx But under no rule of common law has it been held that the opinion of an expert as to when silicosis actually appeared starts the statute running. The cause of action and the wrong may be committed perhaps, at different times, but must occur within the time of employment."

Justice Hand dissented in part, and said:

> "Whether the causes of action arose when the plaintiff inhaled silica dust particles, during the term of his employment by the defendant, or only when the disease of silicosis developed as the result of inhaling, is not an easy question to answer. But I believe we are justified in following the decision of the Division of the New York Supreme Court in Conklin v. Draper, 241 N.Y. Supp., 529, affirmed in 254 N.Y. 620, 173 N.E. 892, and regarding the last date of inhaling the silica dust as the time from which the statute runs for those causes of action which are founded on negligence."

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If the foregoing rule applied to the case of Borel, who moved from employment to employment, and allegedly worked with the product of the various defendants (containing some asbestos), limitation as to each alleged exposure would begin to run from the time each employment ceased or when exposure to a particular product ceased at the close of such employment, provided that plaintiff could meet the burden of proof that he received an injury from such exposure. The Court must also consider that once the statute of limitation begins to run it is not suspended by an exposure to the product of a separate defendant in the future.

Another rule as to the accrual of the cause of action is expressed in Prosser on Torts, 3rd Edition, Para. 30: When plaintiff has in fact discovered that he has suffered injury or by the exercise of reasonable diligence should have discovered it.

Argument will be made that the cause of action did not accrue and limitation did not begin to run until the existence of the disease of asbestosis is manifested and is discoverable in the exercise of reasonable diligence. See Urie v. Thompson, Supreme Court of the United States, 69 S. Ct. Reporter, 1018, 1949. This case arose under the Federal Employers Liability Act and the Boiler Inspection Act. This is not the rule under Texas law, but will probably be the rule contended for by the plaintiff.

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The claim of Borel for workmen's compensation was filed June 4, 1969, and the compromise of this claim was approved by the Industrial Accident Board on July 31, 1969. The question arises as to whether the filing of the claim for workmen's compensation and the approval of the settlement tolls the statute of limitation. It is the position of defendants that the two year statute of limitation of the State of Texas barred any cause of action by Borel for negligence or breach of warranty more than two years prior to the date on which he filed his claim. The general rule is that limitation of plaintiff's action against a third party injuring an employee was suspended under the Texas Workmen's Compensation Act from the day the employee filed his claim until entry of final judgment against the insurer (Revised Statute 1925, Article 5526, Subdivision 6; Article 8307, Paragraph 6A). Fidelity Union Casualty Company v. Texas Power & Light Company, Ct. Civ. App., Texas, Dallas, 35 S.W. (2d) 782. Limitation runs from date of approval of settlement. Judice v. Sommer Sollitt Company of Texas, Ct. Civ. App., Texas, Beaumont, 1961, 346 S.W. (2d) 135, err. ref., no reversible error; and Yeary v. Hinojosa, Ct. Civ. App., Houston, 1957, 307 S.W. (2d) 325, err. ref., n.r.e.

Article 8307, Para. 6A, does not operate to toll the statute of limitation while a suit against the wrong employer runs

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its course. Likewise, the pendency of a compensation action which was barred by limitation does not toll the statute of limitation to a common law action. Garza v. Sumrall, Ct. Civ. App., San Antonio, 267 S.W. (2d) 912, writ of error refused.

It is the position of each of the defendants that if plaintiff, Borel, had a cause of action against the manufacturer of the product being used by Borel's employer, Fuller-Austin Insulation Company, on January 17, 1969, the date of his last claimed exposure, that any alleged cause of action for negligence against the manufacturers of other products was in nowise affected. If the running of any statute of limitation was suspended it was only as to an alleged cause of action against the manufacturer of the product which was being used by Borel at the time he claims he received his last injury. We submit that the State of Texas recognizes the proposition that the statute of limitation begins to run or the cause of action accrues at the time of each exposure and alleged injury. We refer to the motion for summary judgment for the testimony of Borel, but would point out that Borel testified:

"Q. Now, at this time, Mr. Borel, throughout your earlier life, let's say, going back four, five, ten years ago, were you or were you not a man in good health?

A. I think I was -- I thought I was in pretty good health. I had no pains outside of lung congestion continually all the time. And I just put it off. They called it pleurisy and so forth. I have had X-rays, went to the

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doctor to have X-rays just to check, and they would say it would be a little cloudy, 'Your lungs was cloudy,' and ask me what type of work I was doing. And I told them. And they would say well that's the reason for this cloudiness in your lungs." (Dep., p. 37, lines 6 through 17).

He then testified: After you've been on some jobs that's real dusty you feel bad all over and have pains all over your chest. I hawked around and coughed a lot and spit a lot of that stuff up and could hardly get started. He admitted this had been going on four or five years. He also admitted to having X-rays as long as ten years ago, that he had the pleurisy problem as long as ten years, that he had chest problems off and on during the last ten years, that he had X-rays to try to determine what the difficulty was.

When he bought his house about six years prior to his deposition, which was more than four years prior to the time any claim was filed for workmen's compensation, and wanted to take out a life insurance policy and they found out he was an insulator they advised him he would have to have a chest X-ray. This doctor told him that his X-rays were cloudy and the reason was his occupation as an insulator. He also had experienced shortness of breath when he walked fast or engaged in climbing, etc., and this was as long as six or eight years prior to the date of his deposition.

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At all times he knew that he was breathing dust containing some asbestos and that breathing this dust was not good for him. He tried the use of a respirator on DuPont jobs as early as 1945 (approximately) and testified:

"Q. Why did you do that? Why did you use a respirator?

A. Why, I just figured this dust is bad for me, but I didn't know how bad it was.

Q. Now, how long -- have you known that as long as ten years?

A. Yes, I known it was dangerous -- any kinda dust was dangerous the way I considered it, I, just myself.

Q. Yes, sir.

A. I considered any kind of dust was hazardous to you."

The dust was so bad in the shipyard that he started using Mentholatum to put in his nose to keep the dust out and this was as long as fifteen years ago.

Borel also testified that he knew that the breathing of asbestos dust could not be good for your health and he has known that the breathing of this dust was bad for him for at least fifteen or twenty years. He also admitted that he knew the breathing of dust was dangerous and bad for your health but he didn't know just how dangerous it was.

When the doctor in Port Neches told him about five or six years prior to the date of his deposition that his lungs were

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cloudy in the X-ray and that this was due to the nature of his employment, Borel knew he was working with products containing asbestos and was subjected to asbestos dust.

Likewise, the asbestos dust problem had been discussed at the union meetings of the asbestos workers of which Borel was a member. He admitted that the insulators had been talking about the safety factor since 1937.

"Q. And you have been aware of the problem since that time. Is that correct?

A. I have been aware of it, it doesn't seem very healthy I know.

Q. You were aware that it wasn't doing you any good breathing it, weren't you?

A. Well, yeah, and then in another way I never did figure that it would harm me."

In June of 1969, Borel in his claim for workmen's compensation stated: "Although I became ill on the last job I worked, the fact is that I have worked as an insulator for the past 33 years, subject to the hazards of the job, and I cannot truthfully say when I contacted asbestosis."

Dr. P. O. Jones testified that it takes 15 years minimal and 20 to 25 years average exposures to asbestos dust to develop the disease of asbestosis. In his opinion, if a man was subjected to rather heavy exposure as much as 30 years ago in shipyards and ship construction, the disease could date from that time. Also,

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the doctor admitted that it is not every exposure to asbestos dust that causes asbestosis. (Dep., pp. 58 and 59).

The doctor also stated that assuming that the man complained of shortness of breath for a period of ten years and had an X-ray in 1964 and was told that he had spots on his lungs that was due to his employment, that Borel should have known at that time that the trouble with his lungs was due to the inhalation of asbestos dust. That if he had been given this history in 1964, he would have immediately recognized that here was an asbestos worker and that he probably had asbestosis.

The doctor also recognized that allowable limits for asbestos particles in air is five million particles per cubic foot of air, the dust exposure count for asbestos dust recommended by the Association of Governmental Hygienists. Unless Borel was exposed to concentrations in excess of the threshold limit, it would not be anticipated that he would sustain any injury from such exposure.

The law of California is that a cause of action for damages resulting from personal injury is barred by the one year statute of limitation and the filing of a claim for workmen's compensation does not toll or suspend the running of the statute. See law and opinion attached. It is likewise the law of the State of Louisiana that a cause of action for personal injury resulting

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from negligence is barred by the one year statute of limitation and the filing of a claim for workmen's compensation does not suspend or toll the running of the statute. A summary of the statutes of limitation of the various states is attached.

In conclusion, it is evident that the alleged exposures to the various products of the defendants which resulted in any alleged development of asbestosis occurred long prior to two years prior to the filing of any claim for workmen's compensation and prior to the filing of this suit. Under the general rule, which is recognized by the law of Texas, the law of New York, and many other states, the statute of limitation runs from the time of the exposure. Borel knew that he was sustaining some injury to his lungs as the result of the exposure, knew that such exposures were dangerous and injurious, but he did not know to what extent the exposures were injurious. Clearly, he had this knowledge long prior to two years prior to the filing of his claim for workmen's compensation and the disposition thereof, and knew that it was causing him some injury. In fact, he was advised that he had spots on his lungs reflected by X-ray and this was due to the nature of his employment, which was working as an insulator with products containing asbestos and that he was exposed to asbestos dust in the performance of his work. He had all of the classic symptoms, shortness of breath, wheezing, had bronchitis for many

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years and pleurisy, all of which related to a lung condition. All of the cases hold that it is not necessary that an exact diagnosis be made before the statute of limitation will run against an alleged cause of action.

We think that we have demonstrated in the principal brief that the plaintiff does not have a cause of action for damages against the manufacturers of products containing asbestos because they did not create the working conditions, etc., but in any event, under the limitation statutes of the State of Texas and the limitation statutes of the various states, which are substantially the same in language, there is no basis for stating that limitation is tolled until a plaintiff has a positive diagnosis of asbestosis. In fact, the Supreme Court of Texas has held that the two year statute of limitation will run against a cause of action for personal injury, save and except in cases of medical malpractice which involve the concealment of a foreign object in the body.

Under the theory that limitation runs from the date a person ceases his employment with an employer or from the date he ceases exposure to a particular product on a particular job, the plaintiff's cause of action against each and all of the manufacturers is barred because it is admitted that the development of this disease began 20, 25 or 30 years ago due to some excessive

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exposures on the job. Even if we were to go to the third theory, that is, the statute runs from the time that the plaintiff knew or should have known that he sustained some injury from dust exposure, it is clearly evident that the plaintiff, Borel, knew that he had sustained some injury five or six years prior to the date of his deposition when he had an X-ray taken, the doctor advised him that he had spots on his lungs and this was due to the fact that he worked as an asbestos worker and was exposed to asbestos dust. At that time, he had trouble with his lungs and had had for some years. We respectfully submit that the plaintiff has no cause of action in the first place, but in any event, if he had one it is barred by the applicable statutes of limitation in the State of Texas or any other state where the alleged exposure occurred. Since the claim of Borel, if any, was barred by the statute of limitation, the alleged cause of action for death by Mrs. Borel is likewise barred by the statute of limitation.

Respectfully submitted;

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief was served on Mr. Ward Stephenson, Stephenson & Thompson, Stephenson Building, Orange, Texas 77630, attorney for plaintiff, by mailing a copy to his office on the 28th day of December, 1970.

OF COUNSEL

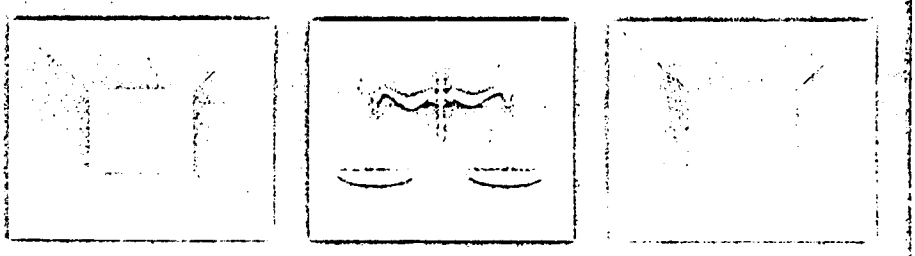
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TABLE OF LIMITATIONS

In response to requests from our subscribers, we have set forth below tabular information on limitations of time and damages. However, the reader is cautioned to note that these limitations are subject to many qualifications and exceptions. Accordingly, direct reference should be made to the statutes of the states involved.

WARNING: There are many exceptions and variations. Examples: Notice of suit against city or county may be required within 30 days; contingencies extending time; manner of injury narrowing time. Table disregards Workmen's Comp. and incidentals such as lost services of injured wife.

LIMITATIONS OF TIME (YEARS) FOR COMMENCEMENT OF ACTIONS

STATE	Personal Injury	Property Damage	Wrongful Death	LIMITATIONS ON RECOVERY FOR WRONGFUL DEATH
ALABAMA	1	1	2	None
ALASKA	2	6	2[1]	None
ARIZONA	2	2	2	None
ARKANSAS	3[2]	3[2]	3	None
CALIFORNIA	1[3]	3[3]	1	None
COLORADO	6	6	2	$35,000
CONNECTICUT	1	1	1	None
DELAWARE	2	2	2	None
DISTRICT OF COL.	3	3	1	None
FLORIDA	4[*]	3	2[*]	None
GEORGIA	2	4	2	None
HAWAII	2[4]	2[4]	2	None
IDAHO	2	3	2	None[5]
ILLINOIS	2	5	2	None
INDIANA	2	2	2	None
IOWA	2	5	2	None
KANSAS	2	2	2	$35,000
KENTUCKY	1[6]	5	1	None
LOUISIANA	1	1	1	None
MAINE	6	6	2	None[7]
MARYLAND	3	3	2[8]	None

[*] Cut to some 6 mos. if tortfeasor dies—Fla. Stat. 733.16.
[1] If party causing death dies, suit against his estate may commence any time after exp. of 6 mos. from issue of Letters Testamentary or of Adm., and until final settlement of estate and disch. of Ex'r or Adm'r, and not otherwise.
[2] If plf. dies before exp. of limitation, rep. has 1 yr. from death to sue, even if limitation expires before end of yr.
[3] Death of parties before exp. of limitation varies time.
[4] If plf. dies before exp. of limitation, limitation extended to 3 yrs.
[5] If person causing death dies, recovery against his estate is limited to $10,000.
[6] 5 yrs. in certain suits against builder.
[7] If minor, max. $5,000 recov. by parents.
[8] If party causing death dies, suit against his estate must commence within 6 mos. after Letters of Adm. issued.

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TABLE OF LIMITATIONS

State	Personal Injury	Property Damage	Wrongful Death	Limitations on Recovery For Wrongful Death
MASSACHUSETTS	2	2	1[9]	$50,000
MICHIGAN	3[10]	3	3	None
MINNESOTA	6	6	3	$35,000
MISSISSIPPI	6	6	6	None
MISSOURI	5	5	2	$50,000
MONTANA	3	2	3	None
NEBRASKA	4	4	2	None
NEVADA	2[11]	3[11]	2[11]	None
NEW HAMPSHIRE	6[12]	6	2	$20,000 to $60,000
NEW JERSEY	2	6	2[13]	None
NEW MEXICO	3	4	3	None
NEW YORK	3	3	2	None
NORTH CAROLINA	3	3	2[14]	None
NORTH DAKOTA	6	6	2	None
OHIO	2	2	2	None
OKLAHOMA	2	2	2	None
OREGON	2[15]	6	3[16]	None
PENNSYLVANIA	2	6	1[17]	None
RHODE ISLAND	2	6	2	Minimum $5,000
SOUTH CAROLINA	6	6	6[18]	None[19]
SOUTH DAKOTA	3	6	3	None
TENNESSEE	1	3	1	None
TEXAS	2	2	2	None
UTAH	4	3	2	None
VERMONT	3[12]	3	2	None
VIRGINIA	2	5	2	$75,000[20]
WASHINGTON	3	3	3	None
WEST VIRGINIA	2	2	2	$110,000
WISCONSIN	3	6	3	$49,000
WYOMING	4	4	2	None

[9] Generally, if acc. occurred before 1968, to recover, the death must occur within 2 yrs. following injury and the action must be commenced within 1 yr. from death and if acc. was in 1968 or later, suit must commence within two years after death, but great care must be taken in applying statute because of its peculiar language and varying circumstances requiring "notice" within as little as 30 days to police and Motor Veh. Registrar and suit within six months after learning identity of def., in hit and run case with an "outer limit" of 3 years, to cite just one example of Mass. limitations.

[10] Shorter if against def. sheriff or constable.

[11] 6 mos. limit and $25,000 max. recov. if suit against State or subdiv. thereof.

[12] 1 yr. if inj. while skiing.

[13] Provided normal limit. for pers. inj. has not already run before death.

[14] If injured pers. dies before exp. of time within which he could have sued, death action may be brought within 1 yr. after death.

[15] In neg. prof. treatment, 2 yrs. from time inj. discoverable, not to exceed 7 yrs.; max. 10 yrs. in neg. pers. inj. in any event.

[16] From time of inj. causing death.

[17] And there is a "Survival Statute" with 2-yr. limit. See Tit. 20, Secs. 320-601.

[18] 2 yrs. if rr. employee; as little as 3 mos. if govt. entity.

[19] Amt. low as $4,000 if against govt. entity.

[20] Distrib. in jury's discretion; also actual med. & hosp. and up to $500 burial.

Art. 5526. [5687–98] [3354–63] [3203–12] Actions to be commenced in two years

There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

1. Actions of trespass for injury done to the estate or the property of another.

2. Actions for detaining the personal property of another, and for converting such property to one's own use.

3. Actions for taking or carrying away the goods and chattels of another.

4. Actions for debt where the indebtedness is not evidenced by a contract in writing.

5. Actions upon stated or open accounts, other than such mutual and current accounts as concern the trade of merchandise between merchant and merchant, their factors or agents. In all accounts, except those between merchant and merchant, as aforesaid, their factors and agents, the respective times or dates of the delivery of the several articles charged shall be particularly specified, and limitation shall run against each item from the date of such delivery, unless otherwise specially contracted. Acts 1841, p. 163; G.L. vol. 2, p. 627.

6. Action for injury done to the person of another.

7. Action for injury done to the person of another where death ensued from such injury; and the cause of action shall be considered as having accrued at the death of the party injured. Acts 1897, p. 12; Acts 1841, p. 163; Acts 1852, p. 128; P.D. 4604; G.L. vol. 10, p. 1066; G.L. vol. 2, p. 627; G.L. vol. 3, p. 1006.

8. Actions of forcible entry and forcible detainer.

Cross References

Sales in violation of,
Insurance Securities Act, limitation of action by purchaser, see art. 580—34.
Securities Act, limitation of action by purchaser, see art. 579—34.

Notes of Decisions

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February 11, 1970

George A. Weller, Esq.,
Weller, Wheelus & Green,
P. O. Box 350,
Beaumont, Texas 77704.

Re: Potter vs. Fibreboard Corporation, et al.

Dear George:

It is unquestionably the law in California that the (one year) Statute of Limitations against a third party is not tolled while an injured employee pursues his compensation remedy. This is such a truism that apparently there are no cases which expressly state the rule. However, the conclusion can be derived from the authorities noted below, as well as from the general rule that, absent fraud or the like, a tolling provision must be found in a statute, and none exists covering the instant situation:

1. Hanna, California Law of Employee Injuries and Workmen's Compensation, 2d Ed., Vol. 2, Ch. 23, sec. 23.04(5): States that the statutory period of limitations against third-parties is one year except for certain situations (incompetency, fraudulent concealment or action filed by employer against third-party within one year) none of which are applicable to the instant question.

2. State Comp. Ins. Fund v. Matulich, 55 Cal. App.

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2d 528, 131 P. 2d 21 (1942): The decision of the court upholding the right of an employee to intervene, more than a year after his injury, in a suit filed by his employer against the third-party within a year of the injury, was based upon the assumption that a separate action filed by the employee himself against the third-party more than a year after his injury would have been barred by the statute of limitations. Harrison v. Englebrick, 254 Cal. App. 2d 871, 62 Cal. Rptr. 831 (1967) may, by dicta and implication, say the same thing.

I am enclosing two copies of each of the above authorities. If I can be of further assistance, please do not hesitate to let me know.

Sincerely yours,

E. Judge Elderkin

EJE:es
Enclosures

cc Mr. R. A. Beck w/enc.

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Note 56

56. Breach of contract and confidence

Two-year California statute of limitations governing film distributor's counterclaim for alleged unlawful appropriation and conversion of its script by film producer, interposed in producer's action for breach of contract to distribute film based upon allegedly converted script, was tolled and did not serve to bar counterclaim even though action was commenced over two years following first exhibition of film. King Bros. Productions, Inc. v. RKO Teleradio Pictures, Inc. (D.C.N.Y.1962) 208 F. Supp. 271.

Evidence sustained finding that defendant brokers had advised plaintiff as to her stock account until she closed it in July of 1964 and that plaintiff had placed great trust and confidence in defendants and in partnership which was predecessor of defendant corporate broker, in action for negligent breach of duty to plaintiff customer wherein defendants contended that regular trading for plaintiff's account terminated in January 1962 and that action filed in December 1964 was barred by this section. Twomey v. Mitchum, Jones & Templeton, Inc. (1968) 69 Cal.Rptr. 222, 262 A.C.A. 759.

Action for reformation of medical expense policy instituted over five years after policy was issued and delivered but within three years from date of discovery that policy, contrary to insurer's representations, excluded coverage for injury sustained in course of employment, was not barred. Laing v. Occidental Life Ins. Co. of Cal. (1966) 53 Cal.Rptr. 681, 244 C.A.2d 811.

The two-year statute of limitations is applicable to the tort of inducing breach of contract. Kiang v. Strycula (1965) 42 Cal.Rptr. 338, 231 C.A.2d 809.

Wife's claim, asserted by trial amendment in divorce action, that agreement whereunder husband purchased her interest in community business had been obtained by breach of confidential relation and fiduciary duty was not barred by limitations, where original complaint had been filed within two years of agreement. Haseltine v. Haseltine (1962) 21 Cal.Rptr. 238, 203 C.A.2d 48.

Use by brewery of idea for advertising and promotion of sale of beer in newspaper advertisements for 13 days, more than two years before plaintiff brought action in which he alleged breach of confidence, by use of idea without his consent, constituted breach of confidence, even if use had been only for test purposes, and plaintiff's action was barred by two year statute of limitations. Thompson v. California Brewing Co. (1957) 310 P.2d 436, 150 C.A.2d 469.

Use by brewery of idea for advertising and promotion of sale of beer more than two years before plaintiff brought action, in which he alleged breach of express and implied in fact contract, if such use had been for test purposes to ascertain whether idea was suitable, would not constitute breach of contract, and action would not be barred by two year period of this section. Id.

57. Oral or written agreement

Action to enforce oral contract to convey land, brought more than five years after alleged making of contract, was barred by two-year period of limitations this section, and even if receipt were deemed a memorandum sufficient to bring contract within statute of limitations applicable to agreements in writing, it was barred by four-year statute of limitations. Kidd v. Kidd (1963) 35 Cal.Rptr. 286, 222 A.C.A. 681.

Two year statute of limitation was not applicable to an action for services rendered a client under a written contingent fee contract. Stone v. Carpenter (1963) 27 Cal. Rptr. 203, 211 C.A.2d 491.

An action for damages arising out of inaccuracy in a report submitted by defendant to an insurer, as to condition of land on which an insured building was located was not an action founded on an instrument in writing, and was therefore subject to two-year statute of limitations, and not four-year limitation on written contracts where only documents involved were agreements that reports furnished would be treated in confidence, a written request for a report on the property involved, and the report. Merchants Fire Assur. Corp. of New York v. Retail Credit Co. (1962) 23 Cal.Rptr. 544, 206 C.A.2d 55.

Where express oral agreement to compensate for services by will is not fulfilled, the agreement implied by law to pay the reasonable value does not arise until day of decedent's death, so that cause of action accrues at that time and statute of limitations does not begin to run until then. Johns v. Coleman (1960) 1 Cal.Rptr. 784, 176 C.A.2d 778.

The two-year limitations of this section, applicable to liabilities not founded upon instruments in writing, rather than the four-year limitation of § 337, applicable where contract is founded upon instruments in writing, governed assignors' action against assignee on written assignment, agreement signed by assignors alone. Bank of America Nat. Trust and Sav. Ass'n v. McLaughlin (1957) 313 P.2d 220, 152 C.A.2d Supp. 911.

58. Instalment contracts

In assignors' action against assignee who had assumed installment obligation to third party, this section was a defense to all installments which accrued for payment more than two years before action was instituted but was no defense to those payments which became due thereafter. Bank of America Nat. Trust and Sav. Ass'n v. McLaughlin (1957) 313 P.2d 220, 152 C.A.2d Supp. 911.

§ 340. One year

Within one year:

Statutory penalty or forfeiture

1. An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation;

Undertaking in criminal action

2. An action upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the people of this state;

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Libel, slander, assault, battery, false imprisonment, seduction, wrongful death, forged or raised check, injury to animal by feeder or veterinarian

3. An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another, or by a depositor against a bank for the payment of a forged or raised check, or a check that bears a forged or unauthorized endorsement, or against any person who boards or feeds an animal or fowl or who engages in the practice of veterinary medicine as defined in Business and Professions Code Section 4826, for such person's neglect resulting in injury or death to an animal or fowl in the course of boarding or feeding such animal or fowl or in the course of the practice of veterinary medicine on such animal or fowl;

Sheriff for escape

4. An action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process;

Damages for seizure

5. An action against an officer to recover damages for the seizure of any property for a statutory forfeiture to the state, or for the detention of, or injury to property so seized, or for damages done to any person in making any such seizure.

6. Action by good faith improver

6. An action by a good faith improver for relief under Chapter 10 (commencing with Section 871.1) of Title 10 of Part 2 of the Code of Civil Procedure. The time begins to run from the date upon which the good faith improver discovers that he is not the owner of the land upon which the improvements have been made.

(Amended by Stats.1963, c. 1681, p. 3284, § 2; Stats.1968, c. 150, p. —, § 1.)

Applicability of Stats.1963, c. 1681, p. 3266, see note under Government Code § 810.

Claim under Vehicle Code §§ 17000-17003, applicability of this section, see Government Code § 643.

Law Revision Commission Comment—Assembly 1968 Amendment

The statute of limitations established by subdivision 6 applies to any action by a good faith improver for relief under Sections 871.1 to 871.7. The equitable doctrine of laches would also provide a defense to a request for relief under those sections.

1963 Amendment. Deleted former subd. 5 and renumbered subd. 6 to be subd. 5.
1968 Amendment. Added subd. 6.

Law Review Commentaries

Action against wholesaler of peas by consumers for injury caused by alleged unfitness, limitations. (1955) 43 C.L.R. 546.
Libel by will. (1954) Law R. 575.
Limitation of actions in action against wholesaler of peas, by consumer, to recover for injuries allegedly caused by the unfitness of the peas for human consumption. (1954) 28 So.Cal.L.R. 81.
Statute of limitations respecting action against insurer under uninsured motorist endorsement—tort or contract? (1960) 48 C.L.R. 531.
Tort liability resulting from design of public property. K. L. Chotiner (1968) 43 S.Bar J. 233.
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Tort liability of public entities and public employees; recommendation. Cal.Law Revision Comm. (1963) Vol. 4, p. 807 et seq.
Sovereign immunity study. Cal.Law Revision Comm. (1963) Vol. 5, p. 326.

I. GENERALLY

1.5 Construction and application

Provisions of Civ.C. § 25 would not be held inapplicable to nonresidents of California maintaining action under California death statute in federal court in New York. Nolan v. Transocean Air Lines (D.C.1959) 173 F.Supp. 114, affirmed 276 F.2d 280, set aside 81 S.Ct. 555, 365 U.S. 293, 5 L.Ed.2d 571, on remand 290 F.2d 904, certiorari denied 82 S.Ct. 177, 368 U.S. 901, 7 L.Ed.2d 96.

Tenants suing landlord and manufacturer of gas furnace for injuries sustained from escaping gas as result of alleged negligence and breach of warranty by defendants could not overcome application of principles relating to time that cause of action accrues by resort to rule applied to disease or injuries cumulative in nature, where neither original nor amended com-

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[Civ. No. 12047. First Dist., Div. Two. Nov. 13, 1942.]

STATE COMPENSATION INSURANCE FUND, Appellant, v. MIKE MATULICH et al., Respondents; LEONARD L. ARNOLD, Intervener and Appellant.

[1] Workmen's Compensation—Actions Against Third Persons—Subrogation—Intervention.—Under Lab. Code, §§ 3850-3860, an insurance carrier in an action in its own name may seek a recovery of all damages sustained by an injured employee at the hands of a third person; and a complaint in intervention filed in such action by the employee is not barred by the statute of limitations although more than a year elapsed from the accident to the filing thereof. In Lab. Code, § 3852, the words "damages for which he is liable" recoverable by the employer relate to the liability of the third person causing the injury or death.

[2] Appeal—Persons Appealing—Party Aggrieved.—The State Compensation Insurance Fund cannot appeal from a judgment on the sustaining of a demurrer to a complaint in intervention filed in its action by an injured employee, since it is not aggrieved thereby.

APPEALS from a judgment of the Superior Court of Santa Cruz County. James L. Atteridge, Judge. Judgment reversed; appeal as to one appellant dismissed.

Action by insurance carrier against persons causing injuries to insured in which the insured intervened. Judgment on sustaining of a demurrer to the intervener's complaint without leave to amend, reversed.

M. Mitchell Bourquin for Appellants.

Yale S. Kroloff and Clark & Heafey for Respondents.

STURTEVANT, J. — On October 4, 1939, Leonard L. Arnold, while in the course of his employment, received personal injuries in an automobile accident. His employer's

[1] See 27 Cal.Jur. 267.

McK. Dig. References: [1] Workmen's Compensation, §§ 23, 28; [2] Appeal and Error, § 91.

compensation insurance carrier, State Compensation Insurance Fund, assumed liability under its policy and has paid and continues to pay compensation to Arnold and to furnish him with hospital and medical attention. On October 3, 1940, the plaintiff, State Compensation Insurance Fund, filed this action against the third parties alleged to be responsible for the injuries to Arnold, to recover from said third parties its expenditures for compensation and hospital and medical treatment, and in its complaint included a claim for the personal injuries sustained by Arnold. Defendants filed a demurrer to that complaint, it was sustained, plaintiff filed an amended complaint, the defendants answered and the cause between the plaintiff and defendants is at issue.

Prior to the filing of the amended complaint, Arnold, the employee, applied for permission to intervene. The record does not disclose that a demurrer was interposed to his application. Both his application and his motion to plead were granted and he filed a complaint May 14, 1941. To that pleading the defendants interposed a general demurrer which pleaded the statute of limitations, subdivision 3 of section 340 of the Code of Civil Procedure. That demurrer was sustained without leave to amend. Thereafter judgment against the intervener was entered in favor of the defendants. From that judgment both the State Compensation Insurance Fund and the plaintiff Arnold have appealed.

[1] This case seems to require a construction of sections 3850-3862 of the Labor Code which apparently have not been construed since the subject matter of said sections was embodied into that code replacing the previously existing statutes relating thereto.

That general subject matter was formerly contained in sections 26 and 26a of the Workmen's Compensation Act. Those sections were frequently amended and the peculiar wording of said sections and the amendments thereto gave considerable difficulty in practice. When the subject matter of those sections was enacted into the Labor Code, the Legisture again failed to free its enactments from ambiguity and probably made the confusion worse.

Prior to the adoption of the Labor Code, the case of *State Compensation Ins. Fund* v. *Allen*, 104 Cal.App. 400 [285 P. 1053], made it clear that under section 26, the insurance carrier could bring an action in its own name to recover its compensation payments and also to recover all

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damage sustained by the injured employee; and that a complaint in intervention could be filed in such action by the injured employee at any time before trial and even though at a time more than one year after the accident as such complaint presented no new issues. That case involved facts quite similar to those before us. If the law in this regard was not changed when the Labor Code was adopted, then the trial court here erred in sustaining the demurrer to the original complaint filed by the State Fund and in sustaining the demurrer to the complaint in intervention, and the judgment should be reversed.

Despite the ambiguity found in section 3852 of the Labor Code, when sections 3850-3862 are read together, and in the light of section 2 of the Labor Code, it appears that no substantial change from former sections 26 and 26a was intended. Defendants have taken the position that under the present law the insurance carrier may not bring an action in its own name and include the damages to the injured employee in the cause of action, and that any complaint in intervention filed by the injured employee in an action brought by the employer presents new issues and must be filed before the statute of limitations expires. If this be true, then the provisions of certain other sections of the Labor Code are rendered meaningless.

Section 3853 still retains the provision that, "If the action is brought by either the employer or employee, the other may, *at any time before trial on the facts, join as party plaintiff*". (Italics ours.) The language is not restricted to the statutory period and the provision that the employee may "join as party plaintiff" is meaningless unless the employer or insurance carrier had already set up the employee's claim for general damages. The employee could have no interest in joining as party plaintiff in an action limited to a recovery of the employer's special damages.

Section 3854 still retains the provision for an action by the employer alone. It permits evidence of any amount the employer has "paid or become obligated to pay" and provides that such expenditures shall be considered as proximately resulting from the injury in addition to *"any other items of damage proximately resulting therefrom"*; and that "After recouping himself for such special damages, together with a reasonable attorney's fee fixed by the court, the employer shall pay *any excess* to the injured employee or other

person entitled thereto." (Italics ours.) If there is no recovery to be had in the action brought by the employer alone for general damages to the employee, where does this excess come from? The excess can only exist and the money to pay the attorney's fee in addition to the special damages of the employer can only exist on the assumption that the action is for the general damages to the employee as well as for special damages of the employer.

Section 3859 provides that "No release or settlement of any claim under this chapter is valid without the written consent of both employer and employee." What possible purpose could this provision have if the employer can only enforce a claim for his own special damage? The employee would have no interest in the release or settlement of such claim.

The ambiguity and confusion arising from the changed language now found in section 3852, arose largely from changing the language originally found in section 26 and inartistically engrafting onto the new language the words "salary, wage, pension or other emolument" originally found in section 26a. But despite the peculiar wording of section 3852, a reading of all the sections shows that it was the intent of the Legislature to relate the words "damages for which he was liable," in said section 3852, to the damages for which the "third person" mentioned in the previous sentence was liable and not to the "damages" for which the employer or insurance carrier was liable.

[2] The State Compensation Insurance Fund attempted to appeal from the judgment by joining the plaintiff Arnold in giving notice of appeal. The defendants assert that the fund was not aggrieved by the judgment, that it had no right to appeal, (Code Civ. Proc., § 938), and that its purported appeal should be dismissed. We think that assertion is sound and the appeal by the State Compensation Insurance Fund is dismissed.

The judgment appealed from is reversed.

Nourse, P. J., and Spence, J., concurred.

Respondents' petition for a hearing by the Supreme Court was denied January 12, 1943.

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to the public entity for acceptance or rejection, including the rather restricted time limits therein prescribed.[17]

[5]—Statute of Limitations

In third-party suits brought by an adult employee, the statute of limitations is one year from the date of injury, since the action is one sounding in tort.[18] Suits filed after the expiration of that period are barred except (1) where the injured employee is a minor or an incompetent, and no guardian has been appointed;[19] (2) where there has been a fraudulent concealment of the fact that the employee has a third-party claim, coupled with an agreement between the third party and the employer to share the expense incident to the injury without disclosure of that fact to the employee;[20] and (3) where suit has been brought within the one-year period by the employer, seeking to recover both his own expenditures and damages for the employee, and the latter intervenes more than one year after date of injury.[21] Where the employee has filed a timely action the employer or his carrier may likewise appear and intervene even though the complaint in intervention is not filed until more than one year after the date of injury.[21.1] In addition, the statute is tolled during the absence of the tortfeasor from the State.[22]

Where the action is one against a public entity, suit must be filed within six months after the date when the claim is rejected or is deemed to have been rejected by the public

[17] See Gov. Code § 945.6; Code Civ. Proc. § 342.

[18] Code Civ. Proc. § 340(3); Morris v. Standard Oil Co., 13 I.A.C. 258, 200 Cal. 210, 252 P. 605 (1926). See generally 2 Larson, WORKMEN'S COMPENSATION LAW, § 75.30.

As to statute of limitations for employer's action, see § 24.06[3], *infra*.

[19] Code Civ. Proc. § 352.

[20] Kimball v. Pacific Gas & Elec. Co., 20 I.A.C. 417, 220 Cal. 203, 30 P.2d 29 (1934).

[21] State Comp. Ins. Fund v. Matulich, 7 Cal. Comp. Cases 313, 55 Cal. App. 2d 528, 131 P.2d 21 (1942); State Comp. Ins. Fund v. Allen, 104 Cal. App. 400, 285 P. 1053 (1930).

[21.1] Harrison v. Englebrick, 32 Cal. Comp. Cases 421, 254 Cal. App. 2d 871, 62 Cal. Rptr. 831 (1967).

[22] Code Civ. Proc. § 351; State Comp. Ins. Fund v. Proctor, 17 Cal. Comp. Cases 148, 102 F. Supp. 451 (1952).

entity[23] in accordance with provisions of the Government Code.[24]

[6]—Res Judicata

For discussion of the defense of res judicata in third-party actions, see Section 24.06[4], *infra*.

§ 23.05 Damages, Attorney's Fees, and Expenses

[1]—Damages

[a]—Generally.

The damages recoverable by the employee in a third-party suit are the full amount of damages suffered by the injured person or his employer, or by his dependents in the event of his death by reason of the injury.[1] It is provided by statute[2] that the damages may comprise all items of damage to employer[3] or employee, including either (1) the amount

[23] Gov. Code §§ 900–915.2.

[24] Gov. Code §§ 945.4, 911.2, 911.4, 911.6.

[1] Western States Gas Co. v. Bayside Lbr. Co., 7 I.A.C. 10, 182 Cal. 140, 187 P. 735 (1920); Massachusetts Bonding Co. v. Los Angeles R.R., 182 Cal. 781, 190 P. 161 (1920).

As to damages recoverable by the employer, generally, see § 24.07, *infra*.

In regard to damages recoverable in wrongful death actions, see § 23.06[1][c], *infra*.

[2] Labor Code § 3855; Burke v. Marshall, 42 Cal. App. 2d 195, 108 P.2d 738 (1940).

[3] The employer's damages include not only all compensation paid or required to be paid (Merino v. Pacific Coast Borax Co., 124 Cal. App. 336, 12 P.2d 458 (1932)), but in addition salary, wages, pension, or other emolument paid to the employee or his dependents for which the employer was liable (Labor Code § 3852). Thus, where the employer is obligated, under the terms of a city ordinance, to pay full salary to the injured employee, such payment constitutes compensation and is the measure of the employer's damage even though it is a greater amount than would be required by the workmen's compensation act itself (Evans v. Los Angeles Ry., 18 I.A.C. 271, 273, 216 Cal. 495, 14 P.2d 752 (1932); Oakland v. Lyckberg, 15 I.A.C. 213, 95 Cal. App. 71, 272 P. 606 (1928). See comment of Supreme Court in denying petition for hearing in Sacramento v. Central California Traction Co., 13 I.A.C. 240, 243, 78 Cal. App. 215, 248 P. 307 (1926).

that appellants knew that the Reichert Trust Deed was subordinate to the $110,000 and $15,000 notes and that they had taken the reassignment of this trust deed subject to the liens created by the notes. Thus, the court did not abuse its discretion when it admitted this evidence.

[8] As to the refusal to admit appellants' parol evidence on this point, it is the rule that parol evidence is not admissible to explain a writing which is plain on its face and that the trial judge's determination on the issue is reviewable on appeal (*Wachs* v. *Wachs,* 11 Cal.2d 322 [79 P.2d 1085]; *Brant* v. *California Dairies, Inc.,* 4 Cal.2d 128 [48 P.2d 13]). It is arguable that the escrow instructions standing alone are ambiguous and that parol evidence should have been admitted by the trial judge to explain the circumstances surrounding the making of these instructions. However, it is clear that appellants were not prejudiced by the court's refusal to admit parol evidence and that this factor was not critical to the final judgment. As we have indicated, the remaining evidence on the issue of estoppel is so convincing that it is unlikely that a different result would have been reached by the trial judge on this issue.

(2) Appellants argue that the court erred in admitting parol evidence to explain the subordination agreement pertaining to the $15,000 loan after having ruled that this agreement was not ambiguous. Appellants have failed to call our attention to the precise testimony of which they complain. If they are referring to the conversation which took place between appellants and Martin A. Najarian and Leo P. Michaelides before appellants executed the subordination agreement (we assume that they are), it is clear that these conversations were admissible on the issue of estoppel (to show appellants' knowledge of the agreement's terms). Furthermore, on direct examination appellant Carpenson testified in detail as to the extent and content of his conversation with Najarian and Michaelides. Thus, respondents were entitled to cross-examine and to introduce additional evidence in relation thereto.

(3) Appellants allege that the court erred in not allowing into evidence answers to numerous interrogatories submitted by appellants to Najarian and Michaelides. Yet neither the reporter's transcript nor the clerk's transcript on appeal contains the answers to these interrogatories. Moreover, appellants did not timely move the court to augment the record. Consequently, the answers to the interrogatories are not part of the record on appeal and this court cannot review the trial court's ruling.

(4) Appellant's arguments concerning the trial court's refusal to take judicial notice of the fraud and conspiracy action which they filed in Fresno County Superior Court against Karl Reichert and others and its refusal to admit testimony relating thereto are lacking in substance and no further comment is necessary.

Appellants' arguments in support of their contention that the court erred in allowing testimony as to the circumstances of the foreclosure sale are equally unconvincing. Moreover, they did not object to the testimony and it is settled that the failure to object to inadmissible evidence is a waiver of the defect (Witkin, Cal. Evidence (2d ed. 1966) § 1285, p. 1188).[4]

The judgment is affirmed.

Conley, P. J., and Stone, J., concurred.

[Civ. No. 23939. First Dist., Div. Three. Oct. 3, 1967.]

WILSON HARRISON, Plaintiff and Respondent, v. WILLIAM ENGLEBRICK, JR., et al., Defendants and Respondents; EMPLOYERS LIABILITY ASSURANCE CORPORATION, LTD., Intervener and Appellant.

[1a, 1b] Limitation of Actions—Against Whom Statute May Be Pleaded: Workmen's Compensation—Actions Against Third Persons—Intervention.—Where, within the one-year period prescribed by statute (Code Civ. Proc., § 340, subd. 3), an employee, injured in the course of his employment, filed his complaint for damages against the third party whose alleged negligent conduct caused his injury, a complaint in intervention filed in the action by the employer's compensation insurer seeking recovery of workmen's compensation benefits paid by it to the employee was not barred by the statute of limitations although it was filed approximately three years after the employee's injury, as the timely filing of the employee's action inured to the benefit of the insurance carrier, and served to protect the carrier against the bar of the statute.

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[1] See Cal.Jur.2d, Workmen's Compensation, §§ 205, 207; Am. Jur., Workmen's Compensation (1st ed §§ 367, 368).

McK. Dig. References: [1] Limitation of Actions, § 17; Workmen's Compensation, § 28; [2] Workmen's Compensation, § 20; [3] Workmen's Compensation, § 23.

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[4] Appellants simply objected to a question asked of Mr. Carpenson on cross-examination as to whether notice of sale had been given.

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[2] **Workmen's Compensation—Actions Against Third Persons.**—An injured employee's claim or right of action against a negligent third person who may have caused his injury is not affected, under Lab. Code, § 3852, by the limitations in Lab. Code, § 3601, restricting the employee's rights against his employer, for injuries sustained in the course and scope of his employment, to compensation pursuant to the workmen's compensation provisions of the Labor Code.

[3] **Id.—Actions Against Third Persons—Subrogation of Insurer.**—The term "employer" includes, under Lab. Code, § 3850, the employer's compensation insurer for purposes of Lab. Code, § 3852, which allows an employer who has made workmen's compensation payments to an injured employee to recover such payments from a negligent third party who caused the injury.

APPEAL from a judgment of the Superior Court of Sonoma County. Charles J. McGoldrick, Judge. Reversed.

Action for recovery of sums paid to one injured through negligence of a third party and to have the amount thereof declared a lien upon any judgment rendered in favor of the injured person. Judgment of dismissal after demurrer was sustained without leave to amend reversed.

Twohy, Wegner & Likens and Gordon V. Wegner for Intervener and Appellant.

Spridgen, Moskowitz, Barrett & Achor and James B. Hinton for Defendants and Respondents.

No appearance for Plaintiff and Respondent.

SALSMAN, J.—Plaintiff Wilson Harrison, an employee of Oakdale Poultry Company, was injured in the course of his employment by the alleged negligent conduct of William Englebrick, Jr., and Safeway Stores, Inc. on October 15, 1961. He filed a complaint against Englebrick and Safeway in the Municipal Court, Santa Rosa Judicial District, Sonoma County April 3, 1962, within one year of his injury. On October 13, 1964, appellant Employers Liability Assurance Corporation, Ltd., which as compensation carrier for Oakdale Poultry had paid Harrison workmen's compensation benefits, filed a complaint in intervention[1] in Harrison's action against Englebrick and Safeway, seeking recovery of such sums and to have the amount thereof declared a lien upon any judgment rendered in favor of Harrison against the defendants Englebrick and Safeway. Thereafter Harrison filed an amended complaint, increasing his prayer for damages beyond the jurisdictional limits of the municipal court, and that court then ordered the action transferred to the superior court.

[1] Labor Code section 3853 permits either the employer or the employee to join in the other's action against a third party ". . . at any time before trial." Code of Civil Procedure section 387 similarly allows any person who has an interest in the matter in litigation to intervene in the action "At any time before trial. . . ."

In the superior court, defendants Englebrick and Safeway demurred to the complaint in intervention on the ground that the cause of action therein contained was barred by the statute of limitations. The superior court sustained the demurrer of the defendants without leave to amend, and entered judgment dismissing appellant's complaint. The intervenor appeals.

[1a] Code of Civil Procedure section 340, subdivision 3 fixes the time within which an action for personal injuries must be filed at one year. Here, Harrison's action was commenced within one year from the date of his injury and was therefore timely filed, but appellant's complaint in intervention was not filed until almost three years from the date of injury. Thus, the single issue on appeal is whether the cause of action expressed in the complaint in intervention is barred by the one-year statute of limitations. As will appear, we conclude that the complaint in intervention was timely filed and therefore reverse the judgment.

[2] Harrison's rights against his employer are limited to compensation pursuant to the workmen's compensation provision of the Labor Code (Lab. Code, § 3601) because his injuries were sutained in the course and scope of his employment. This fact, however, does not affect his claim or right of action to recover damages for his personal injuries against negligent third persons who may have caused his injuries. (Lab. Code, § 3852.)

[3] An employer who has paid compensation to an employee injured by the negligent conduct of a third person may recover such payments against the negligent third person (Lab. Code, § 3852). As used in the Labor Code, the term "employer" includes the employer's compensation insurer. (Lab. Code, § 3850.) In *Witt* v. *Jackson*, 57 Cal.2d 57, 69 [17 Cal. Rptr. 369, 366 P.2d 641], the Supreme Court pointed out that: "There are three ways in which an employer who becomes obligated to pay compensation to an employee may recover the amount so expended against a negligent third party. He may bring an action directly against the third party (Lab.

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Code, § 3852), join as a party plaintiff or intervene in an action brought by the employee (Lab. Code, § 3853), or allow the employee to prosecute the action himself and subsequently apply for a first lien against the amount of the employee's judgment, less an allowance for litigation expenses and attorney's fees (Lab. Code, § 3856, subd. (b))." Here appellant has chosen to intervene in the employee's action rather than bring a separate action of its own against the negligent third party.

[1b] Where the insurance carrier of an employer seeks to recover benefits paid to an injured employee and chooses to bring its own action directly against the third person alleged to be responsible for the employee's injuries, it is clear that the carrier's complaint must be filed within one year from the date of injury. (*Aetna Cas. etc. Co.* v. *Pacific Gas & Elec. Co.*, 41 Cal.2d 785, 786-787 [264 P.2d 5, 41 A.L.R.2d 1037]; *City of Los Angeles* v. *Aldrich*, 242 Cal.App.2d 306 [51 Cal. Rptr. 408]; *Liberty Mutual Ins. Co.* v. *Fabian*, 228 Cal.App.2d 427 [39 Cal.Rptr. 570].) It has been held, however, that if the carrier files suit before the employee, and does so within one year of the date of injury, the injured employee's complaint in intervention is timely even though filed well after the one-year period has run. (*State Comp. Ins. Fund* v. *Allen*, 104 Cal.App. 400 [285 P. 1053]; *State Comp. Ins. Fund* v. *Matulich*, 55 Cal.App.2d 528 [131 P.2d 21].) There is no reason why the latter rule should not have equal application to those cases where, as here, the employee's action is timely filed, and the carrier seeks to intervene after the expiration of the one-year period. The employee's action is brought not only for the employee's benefit, but also for the benefit of his employer, at least to the extent that the employer has paid compensation benefits to the employee and the amount thereof is recoverable in the employee's action. (*Witt* v. *Jackson*, *supra*, 57 Cal.2d 57, 72; see also *Benwell* v. *Dean*, 249 Cal.App.2d 345 [57 Cal.Rptr. 394].) Therefore, the timely filing of the employee's action inures to the benefit of the employer, and serves to protect the employer against the bar of the statute of limitations, which, as we have seen, may successfully be raised when the employer or his insurance carrier brings a separate action, and the action is filed more than one year from the date of injury.

While no California case directly in point has been cited to us, and we have found none, at least one federal case supports our conclusion. In *Dierks* v. *Alaska Air Transport*, 109 F.Supp. 695, the plaintiff brought a timely action against a

defendant for damages for personal injuries. The insurance carrier of plaintiff's employer sought to intervene after the time for the filing of an action for personal injuries had expired. The court concluded that the timely filing of the plaintiff employee's action inured to the benefit of the intervenor and hence permitted the filing of the complaint in intervention.

Since the law is clearly established that, when the employer's action is timely filed, the employee may intervene and press his complaint in intervention to recover damages for personal injuries, even though the employee does not appear and make such a claim until more than one year after his injury (*State Comp. Ins. Fund* v. *Matulich*, *supra*) it seems reasonable to conclude, as we do, that where the employee has filed a timely action the employer may likewise appear and intervene even though his complaint in intervention is not filed until more than one year after the date of injury. (*Dierks* v. *Alaska Air Transport*, *supra*, 109 F.Supp. 695.) The purpose of the statute of limitations is to give the adverse party timely warning of the real claims against him and to prevent the assertion of stale claims. That purpose was substantially served here when the employee, Harrison, filed his complaint less than six months after the injury occurred.

The judgment is reversed.

Draper, P. J., and Bray, J.,* concurred.

*Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

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