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Borrowing Statutes of Limitation and Conflict of Laws

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BORROWING STATUTES OF LIMITATION AND CONFLICT OF LAWS*

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BASIC ISSUES UNDERLYING BORROWING STATUTES

On December 9, 1929, Phyllis Heath and her husband, both residents of Michigan, executed a note in that state payable in Ohio to Jane Scott, a resident of Napoleon, Ohio. Approximately twenty years after Mrs. Heath had last made any payment on the note, Mrs. Scott's estate attempted to enforce the obligation by setting it off against a bequest to Mrs. Heath. The Supreme Court of Ohio permitted the set-off over Mrs. Heath's objection that it was barred by either the Ohio or the Michigan statute of limitations.[1] Mrs. Heath pleaded that she "never did anything whatever to hamper the obligee in the collection of the amount loaned, never moved from the place where she, the obligor, always resided and never did anything to justify the infliction of penalties or forfeitures against her . . . ."[2] The court held that Ohio's "borrowing statute" was not applicable because the cause of action arose in Ohio, where the note was payable, rather than in Michigan, where it was executed and where Mrs. Heath had continually resided. Therefore, the set-off was not barred by the Michigan limitation of six years. Neither was it barred by the Ohio limitation of fifteen years, because Mrs. Heath was a non-resident and the prescriptive periods of Ohio do not begin to run until the obligor becomes a resident of that state. In response to her contention that this result is "repugnant to elementary principles of justice," the court stated:[3]

> "Statutes of limitation are statutes of repose and when they are not applicable it is not unjust that a person who has received full and complete consideration for the making of a contract should be compelled to execute her part of it."

The end result of the court's reasoning and interpretation of applicable Ohio statutory provisions was that *no* statute of limitations would bar enforcement of the claim in Ohio as long as Mrs. Heath remained a non-resident.

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1. Meekison v. Groschner, 153 Ohio St. 301, 91 N.E.2d 680 (1950).
2. *Id.* at 310, 91 N.E.2d at 684.
3. *Id.* at 311, 91 N.E.2d at 684-85.

Mrs. Heath's plight poignantly illustrates some basic problems involved when a cause of action has contacts with more than one state, and defendant alleges that the statute of limitations of some foreign state bars the action in the forum because of the latter's borrowing statute of limitations. Several factors that influenced the court in disposing of Mrs. Heath's asserted defense can be detected:

> (1) A reaction, possibly visceral, against the "justness" of allowing one to escape admitted liability because of the mere passage of time;
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> (2) although not specifically mentioned by the court, application of the accepted common law conflicts rule that the forum will apply its own periods of limitation as part of its "procedural" law;
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> (3) refusal to apply the Ohio borrowing statute unless the facts presented fitted precisely the court's interpretation of the words used in the statute — perhaps based upon a desire to avoid application of some "foreign" law unless clearly compelled to do so; and finally,
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> (4) a possible predisposition toward a resident creditor in the enforcement of his claim, although the court obviously did not admit to such an inclination.

Each of these factors reflects the ethnocentric thinking that too often is the basic starting point in a case involving conflict of laws. This propensity to favor the forum's own law, and particularly its own rules of "procedure," will be the primary concern of this discussion. Borrowing statutes represent an inroad upon such ethnocentric thinking, and it shall be the purpose of this article to discover whether this inroad is beneficial.

Two factors which might have influenced the Ohio court in rejecting Mrs. Heath's defense should be considered before dealing with the narrow subject of borrowing statutes. First, what policy, if any, is so meritorious that a court should refuse to enforce an admittedly valid obligation on the sole ground that plaintiff has waited too long? Second, why should a court apply its own prescriptive periods without considering competing interests which the two jurisdictions might have in the enforceability of plaintiff's action? No satisfactory answer can be given to either question, but the issues raised in attempting to answer them so permeate the enactment and application of borrowing statutes that both must be discussed in order to appreciate fully the problems arising out of such legislation.

Policy Factors Underlying Statutes of Limitation

A court's attitude toward the "justness" of refusing to allow an obligee to recover merely because he has been tardy in pressing his

claim may have a direct bearing upon its attitude toward a borrowing statute. If the court favors asserted policy factors behind statutes of limitation, a liberal construction of a borrowing statute is likely to follow, and the court will be more easily persuaded to bar action in the forum by reference to some foreign period of limitation. On the other hand, if the court takes the position, as did the Ohio court in Mrs. Heath's case, that the obligor "hired the money" and should be compelled to pay even though the obligee has been lax in enforcing his claim, the court is likely to view a borrowing statute through astigmatic eyes.

In most instances, statutes of limitation are applied with little or no discussion as to why passage of time should operate to bar enforcement of an otherwise enforceable cause of action. Even in those few instances in which some attention is directed to the "ought" of statutory periods of limitation, the arguments made in justification have become so standardized that a form list of policy considerations might be printed and distributed for use in all cases in which an issue of prescription might arise. A comment made by the Illinois Supreme Court is typical:[4]

> "Statutes of limitation are statutes of repose, intended to prescribe a definite limit of time within which the remedies included within their provisions must be prosecuted. They are designed to afford security from stale demands, when, from lapse of time, death of witnesses, failure of memory, loss of vouchers, and other causes, the true state of the transaction may be incapable of explanation and the rights of the parties cannot be satisfactorily investigated."

"Statutes of repose" and "stale demand" seem to be the magic words. But what do they mean in a case which does not involve the possibility of "death of witnesses, failure of memory," and so forth? In the case from which the foregoing quotation was taken, plaintiff sought to enforce a judgment rendered in another state. It is possible that the record of a foreign judgment might be lost, but since the judgment could be found and examined, what bearing did the memory of witnesses and "other causes" have on enforceability in Illinois more than five years after the foreign judgment was rendered? Mrs. Heath's case provides another example: she did not contend that the note involved was not executed or that she did not in fact owe the unpaid balance; liability was admitted. In such a case it is obvious that the magic words *stale demand* signify nothing if they refer only to a policy of preventing enforcement of a claim that time has rendered difficult of proof. However, time does render proof more

4. Davis v. Munie, 235 Ill. 620, 621, 85 N.E. 943, 944 (1908).

difficult in a wide variety of cases, and when such a case is involved, there should be little argument with the proposition that plaintiff should be required to enforce his cause of action within a reasonable time. Perhaps all causes of action based upon tortious conduct in which the facts involved must be established by means of personal observation would fall within such a category, as would oral contracts and other transactions which must be proved solely by parol evidence. In addition, time carries with it the possibility of loss or obliteration of documentary evidence, and it would cause undue hardship to permit recovery when time has erased documentary evidence of defendant's non-liability. But what of Mrs. Heath's case and enforcement of a foreign judgment? Is there any justification for disallowing recovery when liability is admitted, evidence has not been lost, and time has in no way prejudiced the defendant in presenting all available defenses?

Although in Mrs. Heath's case liability was admitted and time had absolutely no effect upon a fair presentation of the operative facts involved, it still seems that there was ample justification for permitting her to avoid liability by pleading "stale demand." It has been suggested that "in ordinary private civil litigation, the public policy of limitations lies in avoiding the disrupting effect that unsettled claims have on commercial intercourse."[5] But perhaps the primary justification for barring enforcement of an admittedly valid claim lies in the importance of effective utilization of judicial machinery. At an early date the United States Supreme Court suggested that "by requiring those who complain of injuries to seek redress by action at law, within a reasonable time, a salutary vigilance is imposed, and an end is put to litigation."[6] If a "reasonable time" for the commencement of actions is established and an end put to litigation, it is possible that some inconsequential or tenuous claims will be eliminated from the trial docket; the court may then concentrate upon relatively current controversies pressed by anxious suitors and crowding the calendar. It is doubtful whether there is any value in completely uncontrolled access to judicial machinery, and it seems reasonable to require that those who wish to litigate in the courts do so without undue delay.

The Forum's Application of its Own Statutes of Limitation

Two distinct types of statutes of limitation might arise in a case calling for application of conflict of laws principles: first, positive

5. Note, *Developments in the Law — Statutes of Limitations*, 63 HARV. L. REV. 1177 (1950).

6. M'Cluny v. Silliman, 28 U.S. (3 Pet.) 270, 279 (1830).

prescription, or the Roman *usucaptio,* whereby one acquires title to real or personal property; and, second, negative prescription, whereby one loses the right to litigate a cause of action.[7] This distinction is most articulately drawn in American statutes by the Louisiana Civil Code, which categorizes prescription as either "acquisitive" or "liberative."[8] Only the latter is involved when it is said that the forum applies its own periods of limitation, for it is fairly well settled that *title* acquired under the limitation laws of another jurisdiction will be recognized in the forum.[9]

In regard to "negative" or "liberative" prescription, American courts have consistently taken the position that these statutory provisions regulate procedure only, and therefore the forum is to apply its own periods of limitation.[10] At an early date a few courts indicated, by way of dicta, that the rule might be otherwise if both plaintiff and defendant had resided in the foreign jurisdiction for the full period under its statutes, so the foreign law had "actually operated on the parties and on the case . . . ."[11] However, this rule was not adopted by other courts dealing with this precise situation.[12] Today the general rule calls for application of the forum's own statute of limitations unless otherwise provided by legislative act or by a specific exception engrafted upon the rule.[13] Thus, if the forum's statute of limitations has run, the action is barred, though not barred

7. Townsend v. Jemison, 50 U.S. (9 How.) 407 (1849).

8. LA. CIV. CODE ANN. art. 3458 (1952) "Acquisitive prescription, definition. The prescription by which the ownership of property is acquired, is a right by which a mere possessor acquires the ownership of a thing which he possesses by the continuance of his possession during the time fixed by law." LA. CIV. CODE ANN. art. 3459 (1952) "Liberative prescription, definition. The prescription by which debts are released, is a peremptory and perpetual bar to every species of action, real or personal, when the creditor has been silent for a certain time without urging his claim."

9. Shelby v. Guy, 24 U.S. (11 Wheat.) 361 (1826). See also, Waters v. Barton, 41 Tenn. 450 (1860); 1 WHARTON, CONFLICT OF LAWS 823 (3d ed. 1905).

10. "That the law of limitation of a foreign country, cannot of itself be pleaded as a bar to an action in this Commonwealth, seems conceded; and is indeed too well settled by authority to be drawn in question . . . ." Bulger v. Roche, 28 Mass. (11 Pick.) 35, 37 (1831). *Accord,* Wells v. Alropa Corp., 82 F.2d 887 (D.C.Cir. 1936); Western Coal & Mining Co. v. Jones, 27 Cal. 2d 819, 167 P.2d 719 (1945); Smith v. Kent Oil Co., 128 Colo. 80, 261 P.2d 149 (1953); Roper v. Monroe Grocer Co., 171 La. 182, 129 So. 811 (1930).

11. Moores v. Winter, 67 Ark. 189, 196, 53 S.W. 1057 (1899) (dictum). A similar position was taken in Missouri prior to enactment of a borrowing statute in that state. Williams v. St. Louis & S.F. Ry., 123 Mo. 573, 582, 27 S.W. 387 (1894) (dictum).

12. See Thompson v. Reed, 75 Me. 404 (1883). *Accord,* Byrne v. Crowninshield, 17 Mass. 55 (1820); Crocker v. Arey, 3 R.I. 178 (1855).

13. Ailes, *Limitation of Actions and the Conflict of Laws,* 31 MICH. L. REV. 474, 489 (1933); 3 BEALE, CONFLICT OF LAWS 1620 (1935).

in the foreign jurisdiction in which it arose;[14] if the forum's statutory period has not expired, the action may be maintained, though suit is barred in the foreign jurisdiction.[15] Even when plaintiff must rely upon a foreign statute to create his cause of action because of the absence of such an action in the forum, he must nevertheless sue within the time allowed in the forum.[16] This rule was apparently promulgated by the gods, for it is "unalterable . . . either in England or in the States of the United States, except by legislative enactment."[17]

Why is this so? There is no dissent from the proposition that the forum should apply its own rules of "procedure," properly so called.[18] Practical necessity requires that the local bench and bar must not be compelled to adjust their own modes of procedure to comply with technical niceties which may exist in another state. But is a statute of limitations properly characterized as a rule of procedure — a rule that regulates the formal steps in a judicial proceeding?

The common law rule, hallowed by the rigor mortis of precedent, is apparently always applied but frequently lamented. In the early case of *Le Roy v. Crowninshield*,[19] Justice Story was faced with the necessity of applying or rejecting the procedural characterization, and solely because of the force of precedent, the forum's statute of limitations was applied. Recognizing that it would be "rashness to expect to throw any new light upon [the subject],"[20] he nevertheless dissented in spirit from the rule he felt compelled to apply.[21]

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14. Potter v. Lefebvre, 95 N.H. 482, 66 A.2d 643 (1949); RESTATEMENT, CONFLICT OF LAWS §603 (1932).

15. Bell v. Kelly Motor Lines, Inc., 95 F. Supp. 682 (D.D.C. 1951); Davison v. Sasse, 72 S.D. 199, 31 N.W.2d 758 (1948); L. D. Powell Co. v. Larkin, 52 S.D. 245, 217 N.W. 200 (1927); Fletcher's Estate, 45 Pa. D. & C. 673 (Orphans Ct. 1942) (dictum); RESTATEMENT, CONFLICT OF LAWS §604 (1932).

16. O'Shields v. Georgia Pac. Ry., 83 Ga. 621, 10 S.E. 268 (1889).

17. Townsend v. Jemison, 50 U.S. (9 How.) 407, 414-15 (1849). See also Heisel v. York, 46 N.M. 210, 125 P.2d 717 (1942); Graves v. Weeks, 19 Vt. 178 (1847).

18. In Bournias v. Atlantic Maritime Co., 220 F.2d 152, 154 (2d Cir. 1955), the court made this observation: "While it might be desirable, in order to eliminate 'forum-shopping,' for the forum to apply the entire foreign law, substantive and procedural — or at least as much of the procedural law as might significantly affect the choice of forum, it has been recognized that to do so involves an unreasonable burden on the judicial machinery of the forum . . . and perhaps more significantly, on the local lawyers involved . . . ." See GOODRICH, CONFLICT OF LAWS 227 (3d ed. 1949); LEFLAR, CONFLICT OF LAWS 109 (1959); STUMBERG, CONFLICT OF LAWS 134 (2d ed. 1951).

19. 15 Fed. Cas. 362 (No. 8269) (C.C. Mass. 1820).

20. *Id.* at 364.

21. "Let us not deceive ourselves; there is no magic in words. Is the proposition, thus laid down, true to the extent, which the purpose, for which it is introduced, required? The distinction between a right and a remedy is admitted. But can a right be truly said to exist upon a contract, when all remedy upon it is

With the exception of Professor Ailes, who is attracted by the "simplicity and convenience"[22] of the common law rule, most writers in this field characterize statutes of limitation as "substantive" in so far as they purport to deny any judicial relief to a tardy plaintiff.[23] In accord with the prevailing non-judicial opinion and the civil law,[24] Professor Stumberg has suggested that limitation laws do not "deal with the method of presenting the facts upon which a right depends but with the legal effect of a fact, the lapse of time, upon a right which the plaintiff claims, when that fact has been properly presented to the court."[25] For this reason, "limitation of actions would seem upon analysis to be substantive and not procedural . . . ."[26] In addition to Professor Stumberg's assertion that limitation statutes do not deal with the formal presentation of facts, one need only note the incongruity resulting when plaintiff must rely upon foreign law to establish his cause of action but defendant is not permitted to defeat that action by reliance upon the same law. Regardless of the "simplicity and convenience" of the common law rule, little can be said in its favor when applied to permit plaintiff to recover for a tort or a breach of contract established solely by reference to some foreign law, notwithstanding the fact that he could not recover in the jurisdiction to which reference is made. Moreover, would it not be equally simple and convenient to apply the limitation rules of the same jurisdiction whose law establishes the existence of a tort or the breach of a contract? In short, statutes of limitation do not regulate the formal procedure of litigation, and there is no valid reason why the forum should not apply the limitation rules of the same jurisdiction to which reference is made for the purpose of finding a legally recognized cause of action.

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legally extinguished?" 15 Fed. Cas. at 368. In answer to his own question, he further asked: "What is the right of a contract, when the remedy is extinguished in perpetuity?" 15 Fed. Cas. at 369.

22. Ailes, *Limitation of Actions and the Conflict of Laws*, 31 MICH. L. REV. 474, 497 (1933).

23. "As an original proposition, it could well be urged, after suit is barred by the law to which reference is made as governing the rights of the parties, the plaintiff's claim, now deprived of its most valuable attribute, should be unenforceable by action elsewhere." GOODRICH, CONFLICT OF LAWS 241 (3d ed. 1949). See LEFLAR, CONFLICT OF LAWS 120 (1959); 3 RABEL, CONFLICT OF LAWS, A COMPARATIVE STUDY 483 (1950); STUMBERG, CONFLICT OF LAWS 147 (2d ed. 1951); Nordstrom, *Ohio's Borrowing Statute of Limitations—A Quaking Quagmire in a Dismal Swamp*, 16 OHIO ST. L.J. 183 (1955). See also, Comment, 35 TEXAS L. REV. 95 (1956), for a collection of arguments and authorities for and against the American procedural characterization, and Comment, 28 YALE L.J. 492 (1919), for an explanation of the evolution of the American rule in terms of "historical accident."

24. 3 RABEL, CONFLICT OF LAWS, A COMPARATIVE STUDY 475 (1950).

25. STUMBERG, CONFLICT OF LAWS 147 (2d ed. 1951).

26. *Ibid.*

STATUTORY SOURCES OF BORROWING STATUTES

Reasons for Enactment

Because of the labyrinth created by the various legislatures which have enacted borrowing statutes, the courts often find it necessary to look for some motivating force in order to intelligently interpret and apply the particular statute involved. Among the various policy factors that have been suggested are the following:

(1) The West Virginia court, after finding a presumption that a contract executed between residents of a foreign jurisdiction is to be performed in that jurisdiction, intimated that application of the foreign statute of limitations might conform with an implied intent on the part of the contracting parties.[27] This suggestion has little appeal because there is no necessity to compound the confusion already existing in this area by applying a legal fiction of questionable merit.

(2) The Illinois court, impressed by the extensive nature of credit and the unprecedented change and growth of trade, has taken the position that borrowing legislation would encourage this growth by barring unsettled claims of long duration.[28]

(3) The Nevada court, in support of the domestic borrowing statute, asserted that it would discourage non-residents from litigating issues which might have been litigated elsewhere, thus partially solving the problem of congestion in its courts.[29]

(4) The frequent averment that borrowing statutes discourage forum shopping[30] is founded on reasoning similar to that which prompts Nevada's desire to avoid congestion and to operate its judicial machinery primarily for the benefit of local residents. In many instances the statutory period is longer in the state in which defendant is presently subject to suit than in the state in which the cause of action arose. If plaintiff's action is already barred by the law of the latter jurisdiction, some feel that he should not benefit from the availability of a more liberal forum.

(5) In a limited number of states the avowed purpose of

27. Davidson v. Browning, 73 W. Va. 276, 80 S.E. 363 (1913).

28. Hyman v. Bayne, 83 Ill. 256 (1876).

29. Wing v. Wiltsee, 47 Nev. 350, 359, 223 Pac. 334, 336 (1924). *Accord*, Kirsch v. Lubin, 131 Misc. 700, 228 N.Y. Supp. 94 (Sup. Ct. 1927).

30. Moore v. Roschen, 93 F. Supp. 993 (S.D.N.Y. 1950); Pack v. Beech Aircraft Corp., 50 Del. 413, 132 A.2d 54 (1957); Fenton v. Sinclair Refining Co., 283 P.2d 799, 805 (Okla. 1955) (dictum).

borrowing legislation is to encourage immigration.[31] In Arizona and Texas[32] a defendant whose liability is barred by some foreign law is not entitled to plead that law in defense of a local action unless he becomes a resident of the forum. This policy has been expressed by the Texas court in no uncertain terms: Immigrants are thus invited "by the strongest inducements . . . ."[33]

(6) Finally, several courts justify borrowing statutes because it is allegedly unfair to expose defendants to suit in the forum after they have acquired repose under the law of the state in which they resided and the cause of action arose.[34] However, before this hardship will arise, the forum's period of limitation must be longer than the statute of limitations in defendant's prior residence, thus permitting a suit that is barred in the latter state. On the other hand, perhaps there is an element of "unfairness" to the *creditor* when the forum's shorter statute of limitation is applied. If unfairness to the creditor does result, borrowing statutes have not alleviated the situation, because the forum's shorter period is generally applied notwithstanding the availability of a borrowing statute.[35]

Apart from these particular policy factors two more basic reasons may be found for widespread enactment of borrowing legislation. First, as a matter of policy,[36] there is no sound reason why an obligee should be entitled to recover in the forum if his action has been fully barred by the law of the state in which it arose, particularly when both parties were residents of that state for its full statutory period

31. Van Dorn v. Bodley, 38 Ind. 402, 413 (1871) (dissenting opinion); Robinson v. Moore, 76 Miss., 89, 103, 23 So. 631, 633 (1898) (*semble*); Copus v. California, 158 Tex. 196, 301 S.W.2d 217 (1957); Continental Supply Co. v. Hutchings, 267 S.W.2d 914, 915-16 (Tex. Civ. App. 1954).

32. ARIZ REV. STAT. ANN. §12-506 (A) (1956); TEX. REV. CIV. STAT. ANN. art. 5542 (1958).

33. Snoddy v. Cage, 5 Tex. 106, 114 (1849). Although the court was dealing with the Texas absent defendant tolling provision, the same policy appears to underlie both statutes.

34. Minniece v. Jeter, 65 Ala. 222, (1880); Robinson v. Moore, 76 Miss. 89, 23 So. 631 (1898); Jamieson v. Potts, 55 Ore. 292, 105 Pac. 93 (1909); 3 RABEL, CONFLICT OF LAWS, A COMPARATIVE STUDY 511 (1950); Note, 63 HARV. L. REV. 1177 (1950). *Contra*, Ailes, *Limitation of Actions and the Conflict of Laws*, 31 MICH. L. REV. 474 (1933). Professor Ailes argues that borrowing statutes represent ". . . an unwarranted departure from principle. It indicates a solicitude for the peace of mind of defaulting debtors which is extraordinary to say the least, and a failure to discern the real nature of the defense of limitation." Ailes, *supra* at 501.

35. The question whether a borrowing statute will operate to extend the forum's prescriptive period is discussed *infra*.

36. According to Professor Ailes, borrowing statutes are based on "policy, not principle." Ailes, *supra* note 34, at 501. This point may be conceded without also

and defendant was subject to the jurisdiction of its courts. If the right of action has been extinguished, this defense should accompany defendant to each jurisdiction in which he might subsequently reside.[37] Second, the prevailing interpretation of tolling statutes based on defendant's absence from the enacting jurisdiction, coupled with the rule requiring the forum to apply its own periods of limitation, has resulted in the possibility of perpetual liability for an ambulatory defendant. Although these statutes are not uniform, all but three[38] fall into three basic groups. The first group, composed of twenty-one jurisdictions,[39] is typified by section 351 of the California Code of Civil Procedure:

> "If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term herein limited, after his *return* to the State . . . ." (Emphasis added.)

Section 19 of the New York Civil Practice Act is typical of the seventeen jurisdictions in the second group:[40]

> "If, when the cause of action accrues against a *person,* he is without the state, the action may be commenced, within the

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accepting his proposition that such legislation represents an unwarranted departure from principle. See note 34, *supra.*

37. Le Roy v. Crowninshield, 15 Fed. Cas. 362, (No. 8269) (C.C. Mass. 1820). *Accord,* Karagiannis v. Shaffer, 96 F. Supp. 211 (W.D. Pa. 1951); Minniece v. Jeter, 65 Ala. 222 (1880); Note, 4 DUKE L.J. 71 (1954).

38. ARK. STAT. ANN. §37-231 (1947); VA. CODE ANN. §8-33 (1957); W. VA. CODE ANN. §5409 (1955).

39. ALASKA COMP. LAWS ANN. §55-2-14 (1949); ARIZ. REV. STAT. ANN. §12-501 (1956); CAL. CIV. PROC. CODE §351; FLA. STAT. §95.07 (1961); GA. CODE ANN. §3-805 (1949); HAWAII REV. LAWS §241-8 (1955); IDAHO CODE ANN. §5-229 (1947); KY. REV. STAT. ANN. §413.190 (1955) (applicable only in favor of a resident); MINN. STAT. ANN. §541.13 (1959); MO. ANN. STAT. §516.200 (1949) (applicable only in favor of a resident); MONT. REV. CODES ANN. §93-2702 (1947); NEV. REV. STAT. §11.300 (1959); N.C. GEN. STAT. §1-21 (Supp. 1959); N.D. CENT. CODE §28-0132 (1960); ORE. REV. STAT. §12.150 (1961); R.I. GEN. LAWS ANN. §9-1-18 (1956); S.C. CODE §10-103 (1952); S.D. CODE §33.0203 (Supp. 1960); TEX. REV. CIV. STAT. ANN. art. 5537 (1958); UTAH CODE ANN. §78-12-35 (1953); WIS. STAT. ANN. §330.30 (Supp. 1961) (not applicable if neither party is a resident).

40. COLO. REV. STAT. ANN. §87-1-30 (1953); DEL. CODE ANN. tit. 10, §8116 (1953); D.C. CODE ANN. §12-205 (1961) (applicable only in favor of a resident); ILL. ANN. STAT. ch. 83, §19 (Smith-Hurd 1959) (not applicable if neither party is a resident); KAN. GEN. STAT. ANN. §60-309 (1949); ME. REV. STAT. ANN. ch. 112, §111 (1954); MD. ANN. CODE art. 57, §5 (1957); MASS. ANN. LAWS ch. 260, §9 (1956); MICH. STAT. ANN. §27.609 (1938); NEB. REV. STAT. §25-214 (1956); N.Y. CIV. PRAC. ACT §19; OHIO REV. CODE ANN. §2305.15 (Page 1954); OKLA. STAT. ANN. tit. 12, §98 (1951); TENN. CODE ANN. §28-112 (1955); VT. STAT. ANN. tit. 12, §552 (1959) (not applicable if both parties resided in the jurisdiction where the cause of action accrued); WASH. REV. CODE ANN. §4.16.180 (1961); WYO. STAT. ANN. §1-24 (1957).

time limited therefore, after his *coming into or return* to the state . . . ." (Emphasis added.)

The third group consists of only nine states.[41] Title 7, section 34, of the Alabama Code is illustrative:

"When any person is absent from the state during the period within which a suit might have been brought against him, the time of such absence must not be computed as a portion of the time necessary to create a bar under this chapter."

Based primarily upon the impetus provided by Chief Justice Kent in the early case of *Ruggles v. Keeler*,[42] the overwhelming majority of courts have held that statutes of limitation have no operative effect until defendant comes into the forum.[43] In those jurisdictions having statutes similar to that of New York, this result would seem to follow from the terms of the statute itself.[44] In those jurisdictions having a statute similar to the one in California, the courts have reached the same result by steadfastly declaring that "return" means both "return" and "enter for the first time."[45] Because of such interpretations of absent defendant statutes, the following might result

41. ALA. CODE tit. 7, §34 (1960); CONN. GEN. STAT. REV. §52-590 (Supp. 1959) (but the time so excluded is not to exceed seven years); IND. ANN. STAT. §2-606 (a) (Supp. 1959); IOWA CODE ANN. §614.6 (1946); MISS. CODE ANN. §740 (1942) (applicable only if the cause of action accrued in Mississippi); N.H. REV. STAT. ANN. §508.9 (1955); N.J. STAT. ANN. §2A: 14-22 (1952); N.M. STAT. ANN. §23-1-9 (1953) (applicable if defendant "shall have been" absent *after* the cause of action arose); PA. STAT. ANN. tit. 12, §40 (1953) (applicable only if the cause of action arose in Pennsylvania).

42. 3 Johns. Cas. 263 (N.Y. 1808).

43. Vernon, *The Uniform Statute of Limitations on Foreign Claims Act: Tolling Problems*, 12 VAND. L. REV. 971, 982 (1959).

44. *E.g.*, Adams v. Frank, 213 F.2d 198 (D.C. Cir. 1954); Stock Exch. Bank v. Wykes, 88 Kan. 750, 129 Pac. 1131 (1913); Osborn v. Swetnam, 221 Md. 216, 156 A.2d 654 (1959). The Illinois absent defendant statute is expressly applicable only if one or both of the parties was a resident of Illinois when the cause of action accrued. ILL. ANN. STAT. ch. 83, §19 (Smith-Hurd 1959). Thus, when a judgment was rendered by a Missouri court between residents of that state, the Illinois limitation on enforcement of foreign judgments began to run on the date judgment was entered in Missouri, and not when defendant subsequently moved to Illinois. Davis v. Munie, 235 Ill. 620, 85 N.E. 943 (1908). However, if plaintiff is a resident of Illinois when the cause of action accrues, the statute of limitation will not begin to run until defendant comes into Illinois, and if he never becomes a resident, the Illinois statutory period is not available as a defense. Mitchell v. Comstock, 305 Ill. App. 360, 27 N.E.2d 620, 624 (1940).

45. *E.g.*, Alaska Credit Bureau of Juneau v. Fenner, 80 F. Supp. 7 (D.C. Alaska 1948); Western Coal & Mining Co. v. Hilvert, 63 Ariz. 171, 160 P.2d 331 (1945); Van Deren v. Lory, 87 Fla. 422, 100 So. 794 (1924); *Contra*, Miller v. Rackley, 199 Ga. 370, 34 S.E.2d 438 (1945); United States Royalty Ass'n v. Stiles, 131 S.W.2d 1060, 1064 (Tex. Civ. App. 1939).

in the absence of a borrowing statute. Assume that *P* and *D* were residents of State *X*, where *P*'s cause of action arose, and that they continued to reside in that state for a period of ten years. *D* subsequently moved to State *Y*, and after maintaining his residence in that state for ten years, he moved to the forum. *P* finally commenced action after *D* had resided in the forum for four years. Assume further that the applicable period of limitation is five years in all three states. *P* may recover despite the fact that a total period of twenty-four years has elapsed. *D* may not plead the limitation laws of either State *X* or State *Y* because the common law rule requires application of the forum's own prescriptive periods; and according to the prevailing interpretation of absent defendant statutes, neither may he plead the forum's statute of limitation, because he has resided in that state for one year less than the five years required.[46] If there is any justification for barring "stale demands," it is clear that such a result is absurd. The forum's interest in effectuating policy factors underlying its rules of limitation is completely defeated. However, if the forum had a borrowing statute, *P* could not have enforced a stale claim already twice barred, and *D* would not be liable merely because he lacked foresight and moved to the forum.

Classification of Borrowing Statutes

After reading the classifications offered in the attached appendices, one might borrow a criticism from Justice Holmes and claim that unnecessary confusion results from "striving for a useless quintessence of all systems, instead of an accurate anatomy of one."[47] Any attempt to analyze all borrowing statutes will result in a certain degree of confusion because of the heterogeneous hodge-podge which a complete compilation of such statutes presents.[48] However, a comparison of all borrowing statutes will not result in a "useless quintessence" for at least two reasons: (1) Since uniform legislation seems desirable,[49] it is important to study all pertinent legislation to discover whether conflict exists, and why; (2) much of the prevailing judicial confusion in this area seems to result from an inaccurate comparison of the

46. See Kirsch v. Lubin, 131 Misc. 700, 288 N.Y. Supp. 94 (Sup. Ct. 1927); Crocker v. Arey, 3 R.I. 178 (1855); L. D. Powell Co. v. Larkin, 52 S.D. 245, 217 N.W. 200 (1927); 3 BEALE, CONFLICT OF LAWS 1622 (1935); Note, 63 HARV. L. REV. 1177 (1950); Note, 35 COLUM. L. REV. 762 (1935).

47. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 475 (1897).

48. One writer has commented that borrowing statutes are "so diverse that their main effect has been to produce almost universal confusion." LEFLAR, CONFLICT OF LAWS 120 (1959).

49. 3 RABEL, CONFLICT OF LAWS: A COMPARATIVE STUDY 522 (1950); Vernon, *Statutes of Limitation in the Conflict of Laws: Borrowing Statutes*, 32 ROCKY MT. L. REV. 287, 323-28 (1960).

local borrowing statute with that of a sister state. By failing to study the wording of foreign statutes, many courts have improperly distinguished between two apparently similar statutes or have overlooked common features of two apparently dissimilar statutes. It is hoped that segregation of the numerous variables involved and classification of such variables according to common features may be valuable in both respects.

To determine the applicability and effect of a borrowing statute, three basic questions should be asked. First, must the cause of action come from within or without the enacting jurisdiction; and if the latter is required, from which jurisdiction having contacts with plaintiff's alleged cause of action? Second, in what jurisdiction must the parties have resided at the time the cause of action was first recognized? And, third, assuming that both questions are answered in favor of applying the borrowing statute, which jurisdiction's law determines whether plaintiff's action in the forum is timely? In regard to most borrowing statutes, it is necessary to answer all three questions; therefore, they are used in appendix A as the basic framework for classifying the various statutory provisions.

Problems of Judicial Interpretation Common to Most Borrowing Statutes

In spite of the variations among borrowing statutes, there are problems of interpretation and application more or less common to all. Most statutes require that the cause of action have its basic or initial contacts with some foreign jurisdiction; thus it becomes necessary for the court to determine where plaintiff's action "arose," "accrued," or "originated," depending upon the particular word chosen by the legislature. Once the court decides that the action has sufficient contact with a given foreign jurisdiction, it must determine how much of the foreign law is to be "borrowed." Will the court apply only the foreign limitation period, or will it also apply other foreign "laws" that might affect the running of that period? And finally, where the foreign period is longer than that provided in the analogous domestic statute, did the legislature intend to extend the time within which suit can be commenced in the forum? Most statutes provide no indication as to where a cause of action "arises," how much of the foreign law should be borrowed, or whether a longer foreign prescriptive period will operate to extend the time within which plaintiff could otherwise commence his action.

Origins of Actions

Most borrowing statutes are applicable only if the cause of action,

when first recognized as such, had its basic contacts with some foreign jurisdiction.[50] If a note is executed and made payable in the forum, its borrowing statute is not applicable although defendant was a nonresident on the date of execution, and even though plaintiff subsequently moves to the state of defendant's residence, where both parties continue to reside for the full period of limitation under that state's law.[51] Such a result would be rejected in Nebraska, where the court is not trammeled by an arising-out-of-the-state requirement.[52] In *Webster v. Davies*[53] the defendant was a resident of Nebraska when various notes were executed and matured. He then moved to Wyoming, where he remained amenable to suit for three years beyond the Wyoming prescriptive period. When he returned to Nebraska and was sued in that state, the court held that "it is immaterial, under our statute . . . where the cause of action arose, or where the defendant resided when it arose. If he has resided in another state so long as to be protected by the statute of that state, such fact is a good defense to an action here."[54] Similar results, based on essentially the same facts, have been reached in Minnesota and Illinois despite specific statutory requirements that the cause of action arise "outside of this state."[55] In *Pattridge v. Palmer*[56] the Minnesota court based its decision on the theory that the cause of action arose simultaneously in Minnesota, where the notes were payable, and in California, where defendant resided and was subject to suit. Thus, the cause of action arose "outside" Minnesota. A federal district court in Illinois also sustained a defense based on a foreign statute of limitations, although the note involved was executed and made payable in Illinois and defendant was a resident of that state when it became due.[57] By permitting defendant to enjoy a peaceful and litigation-free ten years in Missouri after the note matured, plaintiff lost his right to sue because his action "arose" not only in Illinois but also in Missouri, where defendant subsequently became subject to the jurisdiction of that state's courts.

The views just discussed serve as an introduction to the problem: Where must a cause of action have its basic contacts? Most statutes specifically require that the cause of action arise *outside* the enacting jurisdiction before the borrowing provision is operative. But assuming that sufficient non-domestic contacts do exist, the problem of

50. See Appendix A.

51. Gamble v. Gamble, 79 Ohio L. Abs. 311, 155 N.E.2d 266 (C.P. 1957).

52. NEB. REV. STAT. §25-215 (1956).

53. 44 Neb. 301, 62 N.W. 484 (1895).

54. Webster v. Davies, *supra* note 53, at 306, 62 N.W. at 486.

55. ILL. ANN. STAT. ch. 83, §21 (Smith-Hurd 1959); MINN. STAT. ANN. §541.14 (1959).

56. 201 Minn. 387, 277 N.W. 18 (1937), 51 HARV. L. REV. 1290 (1938).

57. Osgood v. Artt, 10 Fed. 365 (N.D. Ill. 1882).

where a cause of action "arises" also has significance in relation to choice of law. For example, if residents of Indiana execute a contract in Kansas to be performed in Ohio and suit is prosecuted in Illinois, the Illinois court will apply the statute of limitations of the state in which the cause of action "arose." Thus, a determination of the "locus" of a cause of action may at the same time resolve two issues: applicability of the forum's borrowing statute and choice of law to be applied.

a. Tort Actions

The courts unanimously hold that a cause of action sounding in tort arises in the jurisdiction where the last act necessary to establish liability occurred.[58] The rhetorical question of whether a cause of action can arise in a state in which defendant is not amenable to service of process is not even raised. The statute of limitations of the jurisdiction in which injury was received is applied notwithstanding the fact that defendant has never been a resident of that jurisdiction.[59] Thus, if plaintiff's property is converted in the forum, its borrowing statute is not available, although defendant was a non-resident at the time of his tortious activity.[60] If plaintiff is assaulted by defendant's employee and action is commenced against the employer for negligently retaining a pugnacious hired hand, the cause of action "originated" in the state where plaintiff was assaulted.[61] And if plaintiff is injured in an automobile collision in Virginia, the statute of limitations of that state is applied, although plaintiff was a resident of New York, defendant was a resident of Florida, and suit was commenced in the federal district court in Pennsylvania.[62]

The "place of injury" rule is also applied in cases where the tort involved might possibly be said to have had its origin in another state. In *Moore v. Roschen*,[63] defendant manufactured "Gene Autry" cowboy suits in New York. The infant plaintiff, a resident of Pennsylvania, purchased such a suit in Pennsylvania and was injured in that state when the suit caught fire. In a similar case, *Sylvania Elec.*

58. *E.g.*, Sylvania Elec. Products, Inc. v. Barker, 228 F.2d 842 (1st Cir. 1955), *cert. denied*, 350 U.S. 988 (1956); Wilt v. Smack, 147 F. Supp. 700 (E.D. Pa. 1957); McLendon v. Kissick, 363 Mo. 264, 250 S.W.2d 489 (1952); Drummy v. Oxman, 280 App. Div. 800, 113 N.Y.S.2d 224 (2d Dep't 1952).

59. See, *e.g.*, Colello v. Sundquist, 137 F. Supp. 649 (S.D.N.Y. 1955); Smith v. Bain, 123 F. Supp. 632 (M.D. Pa. 1954); Hornsey v. Jacono, 12 Pa. D. & C.2d 291 (C.P. 1957).

60. Janeway v. Burton, 201 Ill. 78, 66 N.E. 337 (1903).

61. Burgert v. Union Pac. R.R., 240 F.2d 207 (8th Cir. 1957). The court concluded that the cause of action originated in Kansas but did not fully explain why.

62. Smith v. Bain, 123 F. Supp. 632 (M.D. Pa. 1954).

63. 93 F. Supp. 993 (S.D.N.Y. 1950).

Products, Inc. v. Barker,[64] the defendant corporation manufactured neon tubing in Massachusetts which was purchased by plaintiff's employer in Nebraska. The plaintiff contracted berylliosis as a consequence of blowing the beryllium-coated tubing by mouth. In both cases the court held that the cause of action arose in the state where injury was received — not in the state where the product was manufactured and where defendant's negligence presumably occurred.[65] Therefore, the question — where does a tort cause of action "arise," "accrue," or "originate"? — is answered without complication or dissent: where the last act necessary to establish liability occurred.

b. Contract Actions

Although no particular difficulty is involved in determining where a tort "arises," "accrues," or "originates," these concepts become fraught with ambiguity where plaintiff's cause of action is founded upon a contract.[66] Assume in the following case that the appropriate statute of limitations in each jurisdiction involved is two years. Maker executed a note in State *A* on January 1, 1950, payable in State *E* on January 1, 1951. On the date of execution Maker was a resident of State *A* and Payee resided in State *E*. On February 1, 1950, Maker moved to State *B* and in May of the same year wrote Payee, unequivocally repudiating all liability under the instrument. The following month Maker moved to State *C*, where he resided on January 1, 1951, when the note matured. On January 1, 1952, before the two-year period of State *C* had expired, Maker moved to State *D*. Having satiated his peripatetic inclinations, he retained his residence in State *D* until January 1, 1961. On that date Payee fortuitously served Maker in State *F*, the forum, where Maker was enjoying a brief vacation. Where did the cause of action arise? Six possibilities are present: (1) State *A*, where the note was executed and where Maker was then a resident; (2) State *E*, where the note was payable and where it shall be assumed that Payee has always resided; (3) State *B*, where Maker resided when he anticipatorily repudiated all liability under the note; (4) State *C*, where Maker was a resident when the note matured; (5) State *D*, where Maker subsequently resided and was subject to suit for the full statutory period of that jurisdiction;

64. 228 F.2d 842 (1st Cir. 1955), *cert. denied*, 350 U.S. 988 (1956).

65. *Accord*, Young v. Hicks, 250 F.2d 80 (8th Cir. 1957); Fulkerson v. American Chain & Cable Co., 72 F. Supp. 334 (W.D. Pa. 1947); McGrath v. Helena Rubinstein, Inc., 29 F. Supp. 822 (S.D.N.Y. 1939).

66. "Unfortunately, these statutes are of different types, and all of them are awkwardly drafted. Most of them identify the competent foreign statute by pointing to the law of the place where the cause of action 'arose' or 'occurred,' a language adequate only for tort actions." 3 RABEL, CONFLICT OF LAWS: A COMPARATIVE STUDY 510 (1950).

and (6) State *F*, the forum, where Maker was found and was subject to *in personam* jurisdiction. While this hypothetical case is slightly exaggerated, courts have selected all but the last alternative as a "locus" for specific causes of action.

Before discussing these various possibilities, it is necessary to define the terms that have caused such a wide divergence of judicial opinion. Borrowing statutes use several different words or phrases to indicate where the cause of action must have its basic contacts. Although the word most frequently used is "arise," "accrue" is found in several statutes and "originate" in one.[67] Judicial decisions are of little assistance in defining these terms, because a definition is available to suit almost any purpose. For example, Iowa, Kansas, and Oklahoma are all "arise" jurisdictions.[68] The Kansas court has argued that no distinction can be drawn between "arises" and "accrues": "The words 'when a cause of action has *arisen*' in a foreign state . . . mean when the cause of action has *accrued* in a foreign state . . . ."[69] On the other hand, the Iowa court felt that "the right to institute action '*accrues*' when by maturity of the note and default in payment the holder may maintain a suit thereon, but it '*arises*' or has its *origin* in the transaction which brought the obligation into existence."[70] Taking a slightly different position, the Oklahoma court held that "a cause of action *arises* when the obligation was *created* which gave *rise* to a right of action as soon as such right *accrued* thereon."[71] In Mississippi and Montana, both "accrues" jurisdictions,[72] the courts use the terms *arise* and *accrue* interchangeably, assuming without explanation that both words have the same legal meaning.[73] Intentionally excluded from this sampling is the further issue as to whether a cause of action can arise or accrue in a jurisdiction where defendant is not then amenable to suit. To compound confusion, the diligent researcher need ask only one additional question: Can a cause of action arise in more than one jurisdiction *at the same time*, or, having once arisen in a given jurisdiction, can it *subsequently* arise in another jurisdiction where suit might be maintained? In answer to this question, the California, Idaho, and Kansas courts assert that a cause of action "in a legal sense," whatever that may mean, can arise

67. See pp. 1-2 of Appendix A *infra*.

68. IOWA CODE ANN. §614.7 (1958); KAN. GEN. STAT. ANN. §60-310 (1949); OKLA. STAT. ANN. tit. 12, §99 (1951).

69. Bruner v. Martin, 76 Kan. 862, 93 Pac. 165 (1907) (Emphasis added.)

70. Moran v. Moran, 144 Iowa 451, 460, 123 N.W. 202, 205 (1909). (Emphasis added.)

71. Doughty v. Funk, 15 Okla. 643, 649, 84 Pac. 484, 486 (1906). (Emphasis added.)

72. MISS. CODE ANN. §741 (1942); MONT. REV. CODES ANN. §93-2717 (1947).

73. Lowry v. International Bhd. of Boilermakers, 220 F.2d 546 (5th Cir. 1955); Chevrier v. Robert, 6 Mont. 319, 12 Pac. 702 (1887).

in but one place.[74] On the other hand, the Illinois and Minnesota courts accept a multiple place of arising theory and hold that a cause of action may arise initially in more than one jurisdiction[75] or may subsequently arise when defendant becomes amenable to process in a second jurisdiction.[76]

This confusion illustrates more than mere quibbling over words, since the outcome of a particular lawsuit may depend directly upon the definition adopted by the court. Unfortunately, few cases have formulated a definition based on the rationale underlying borrowing statutes. Borrowing statutes are enacted for the purpose of refusing to enforce a cause of action which was not, but could have been, seasonably enforced in some other jurisdiction. If plaintiff has had a reasonable time within which to bring action in any given jurisdiction where defendant was amenable to process but has failed to do so within the period of limitation provided by that state, there is no good reason why the forum should open its courts merely because its prescriptive period is more liberal and plaintiff fortuitously served defendant within its borders. This underlying rationale is discernible only by inference in those statutes borrowing the limitation laws of the jurisdiction where the cause of action "arose," et cetera. To effectively perpetuate the policy behind such legislation, the place where the cause of action "arose" should not control, and the courts should not be forced to devise strained definitions for penumbral verbiage.

In attempting to interpret the two statutory requirements mentioned — that the cause of action "arise" in another jurisdiction and that the borrowed law be that of the state where the cause of action "arises" — the courts have developed three frequently recurring theories which call for reference to the place of performance, the place of contracting, or the place where defendant was amenable to service of process.

A majority of the courts hold that *arise* or *accrue* necessarily refers to the jurisdiction in which the contract was to be performed.[77] If no place of performance was specifically mentioned in the contract, it is assumed that performance was intended in the jurisdiction in which defendant was then a resident.[78]

74. McKee v. Dodd, 152 Cal. 637, 93 Pac. 854 (1908); West v. Theis, 15 Idaho 167, 96 Pac. 932 (1908); Hayes Land & Inv. Co. v. Basset, 85 Kan. 48, 116 Pac. 475 (1911).

75. Pattridge v. Palmer, 201 Minn. 387, 277 N.W. 18 (1937), 51 HARV. L. REV. 1290 (1938).

76. Osgood v. Artt, 10 Fed. 365 (N.D. Ill. 1882); Hyman v. McVeigh, 87 Ill. 708 (1877).

77. *E.g.*, C. & L. Rural Elec. Co-op. v. Kincade, 175 F. Supp. 223 (N.D. Miss. 1959); Cvecich v. Giardino, 37 Cal. App. 2d 394, 99 P.2d 573 (1940); Hobbs v. Ludlow, 199 Ind. 733, 160 N.E. 450 (1928); Meekison v. Groschner, 153 Ohio St. 301, 91 N.E.2d 680 (1950).

78. Pond Creek Mill & Elevator Co. v. Clark, 270 Fed. 482 (7th Cir. 1920);

In support of the theory that reference should be made to the place of contracting, that is, where the cause of action "originated," the result in some cases has been based upon statutory use of this specific word or similar language, while other courts have reached the same conclusion by construing "arise" to mean "originate." The Alabama and Missouri borrowing statutes clearly call for application of the law of the jurisdiction in which the cause of action originated, the former referring to the foreign jurisdiction in which the contract was made[79] and the latter to the jurisdiction in which it "originated."[80] In compliance with this specific statutory language, the courts in both states have held that their borrowing statutes have no effect if the contract involved was executed in the forum.[81] A similar result has also been reached in several states not having such statutory language. In *Moran v. Moran*,[82] plaintiff, an Iowa resident, filed suit in that state against a resident of Michigan. The last act necessary to execute the contract in question took place in Iowa rather than in Michigan. The defendant contended that the cause of action could not arise in Iowa because of his continuous residence in Michigan; the Iowa court rejected this contention and stated that "the right to institute action 'accrues' when by maturity of the note and default in payment the holder may maintain a suit thereon, but it 'arises' or has its origin in the transaction which brought the obligation into existence."[83]

Although not as articulate as the Iowa court, an Oklahoma court came to the same conclusion when it held that *arise*, as distinguished from *accrue*, has reference to the beginning or origin of a right of action, "as soon as such right accrued thereon."[84] The position taken by both the Oklahoma and Iowa courts is untenable. In *Swift v. Clay*[85] the Kansas court convincingly argued that "the giving of a note, which is the making of a contract, does not give rise to a cause of action. Surely every simple business transaction between men does not give provocation for a lawsuit. It was not the making, execution, and delivery of this note which gave rise to the cause of action; it was not the promise to pay, but the breaking of that promise . . . ."[86]

Hobbs v. Ludlow, 199 Ind. 733, 160 N.E. 450 (1928).

79. ALA. CODE tit. 7, §34 (1960).

80. MO. ANN. STAT. §516.180 (1949).

81. Wright v. Strauss & Co., 73 Ala. 227 (1882); Williams v. Illinois Cent. R.R., 360 Mo. 501, 229 S.W.2d 1 (1950).

82. 144 Iowa 451, 123 N.W. 202 (1909).

83. Moran v. Moran, *supra* note 82, at 460, 123 N.W. at 205.

84. Doughty v. Funk, 15 Okla, 643, 649, 84 Pac. 484, 486 (1906).

85. 127 Kan. 148, 272 Pac. 170 (1928).

86. Swift v. Clay, *supra* note 85, at 149, 272 Pac. at 171. *Accord*, Bruner v. Martin, 76 Kan. 862, 93 Pac. 165 (1907); Freundt v. Hahn, 24 Wash. 8, 63 Pac. 1107 (1901).

The theory that a cause of action arises or accrues in the jurisdiction where defendant is amenable to service of process is based on the belief that a cause of action cannot exist in a jurisdiction in which a remedy is not available. Courts carrying this basic proposition to its logical conclusion have held that a cause of action initially arises in the jurisdiction in which the obligor may be sued on the date of performance, and that an action also arises in each jurisdiction in which defendant might subsequently become amenable to suit. Illinois is the leading advocate of this theory, which had its origin in *Hyman v. McVeigh*:[87]

> "The words 'when a cause of action has arisen,' as they occur in the statute pleaded, should be construed as meaning, when jurisdiction exists in the courts of a state to adjudicate between the parties upon the particular cause of action, if properly invoked; or, in other words, when the plaintiff has the right to sue the defendant in the courts of the state upon the particular cause of action, without regard to the place where the cause of action had its origin."

In an action based on a note executed and payable in Texas, an Illinois court applied this doctrine and held that the Illinois borrowing statute was not applicable because defendant was a resident of Illinois when the note matured.[88] It has also been held that a cause of action arises in each state where the debtor subsequently becomes amenable to service of process, and if action has been fully barred according to the laws of any such jurisdiction, action is barred in Illinois.[89] The *Hyman v. McVeigh* interpretation of the word *arises* has also been adopted in Kansas, Minnesota, and Nevada.[90] In *Hays Land & Investment Co. v. Basset*[91] the Kansas court held that plaintiff's action was barred by expiration of the Nebraska statutory period (the jurisdiction in which defendant resided on the date his note matured), although the note was executed and payable in Kansas. In Minnesota and Nevada the leading cases of *Luce v. Clarke*[92] and *Lewis v. Hyams*[93] have firmly established the rule that a cause of action, for purposes

87. 87 Ill. 708 (1877).

88. National Bank of Denison v. Danahy, 89 Ill. App. 92 (1899).

89. Osgood v. Artt, 10 Fed. 365 (N.D. Ill. 1882); Humphrey v. Cole, 14 Ill. App. 56 (1883).

90. Timmonds v. Messner, 109 Kan. 518, 200 Pac. 270 (1921); Pattridge v. Palmer, 201 Minn. 387, 277 N.W. 18 (1937); Wing v. Wiltsee, 47 Nev. 350, 223 Pac. 334 (1924).

91. 85 Kan. 48, 116 Pac. 475 (1911).

92. 49 Minn. 356, 51 N.W. 1162 (1892). *But cf.* Powers Mercantile Co. v. Blethen, 91 Minn. 339, 97 N.W. 1056 (1904), in which the court appeared to adopt a place of origin theory.

93. 26 Nev. 68, 63 Pac. 126 (1900).

of borrowing a foreign period of limitation, arises in any state where defendant may be found.[94]

Unfortunately, most courts have construed the word *arise* literally.[95] The facts involved in the California case of *McKee v. Dodd*[96] illustrate a possible result when the *Hyman v. McVeigh* doctrine is rejected. Decedent and plaintiff were both residents of New York when decedent executed a note payable in that state. Prior to the date of maturity decedent left New York, residing first in California and then in Honolulu until his death. Despite the fact that the Hawaiian period had fully run while decedent was a resident of that jurisdiction, the court held that the California borrowing statute makes reference "only to the primary and original jurisdiction in which the cause of action arises, and does not contemplate other jurisdictions in which a cause of action may arise or accrue, depending upon the peripatetic inclinations of the defendant . . . ."[97] Thus, the cause of action "arose" in New York, where decedent was not subject to suit on or after the date the note matured; and as long as he did not reside in California for its full statutory period, action would never be barred in that state.

In an attempt to justify a result similar to that of *McKee*, the Idaho courts in *West v. Theis*[98] suggested that if a cause of action arose in each state to which a defendant moved, the plaintiff would have to hire a detective force and a law firm to keep him posted on the whereabouts of the defendant and the statutes of limitation in each jurisdiction in which defendant settled. This justification would seem to have little foundation in fact unless the court assumed that all debtors who change their places of residence do so for the purpose of fraudulently hindering collection of their obligations. In the *West* case plaintiff had no difficulty in commencing his action in Idaho, although the notes involved were executed and payable in Kansas; and there is nothing in the opinion to indicate that plaintiff could not also have commenced action with equal facility in Washington, where the maker resided for that state's full statutory period.

A few cases have held that a cause of action cannot arise in a jurisdiction in which a full and adequate remedy is not available. For

94. See Lewis v. Hyams, *supra* note 93, at 71, 63 Pac. at 127. The underlying reason for applying the *Hyman v. McVeigh* doctrine may be found in a statement by the Minnesota court in *Luce v. Clarke*, 49 Minn. at 359, 51 N.W. at 1163.

95. *E.g.*, McKee v. Dodd, 152 Cal. 637, 93 Pac. 854 (1908); West v. Theis, 15 Idaho 167, 96 Pac. 932 (1908); Runkle v. Pullin, 49 Ind. App. 619, 97 N.E. 956 (1912); Chevrier v. Robert, 6 Mont. 319, 12 Pac. 702 (1887); Meekison v. Groschner, 153 Ohio St. 301, 91 N.E.2d 680 (1950).

96. 152 Cal. 637, 93 Pac. 854 (1908).

97. McKee v. Dodd, *supra* note 96, at 642, 93 Pac. at 856.

98. 15 Idaho 167, 96 Pac. 932 (1908).

example, in *Curtis v. Armagast*[99] all the parties were residents of New York at the time allegedly fraudulent acts resulted in the transfer of a deed from mother to son. All operative facts occurred in New York, except for recordation of the deed in Iowa, where the land was located. After the New York statute of limitations had fully barred all available relief in that state, plaintiff commenced a suit in Iowa, asking the court to cancel the deed, expunge it from Iowa records, and adjudge that she was the owner of an undivided interest in the land. Although admitting that the cause of action had its primary contacts with New York, and not Iowa, the court nevertheless held that the action could arise only in Iowa, where the land was located, because that was the only place where full and appropriate relief was available.[100] Because of the peculiar fact situation, it was reasonable to hold that plaintiff's remedy should not be barred because of failure to enforce an inadequate remedy in a foreign jurisdiction.

c. Miscellaneous Actions

The general rules which the courts have developed to determine where a cause of action arises do not cover all possible situations. Several miscellaneous factual patterns have necessitated application of principles which do not fit precisely within these general rules.

Anticipatory Breach of Contract. In *Balee v. Hidalgo County Water Improvement Dist.*[101] a contract was executed in Texas for the purchase of municipal notes to be issued and delivered in Arkansas. After plaintiff had made a down payment, defendant repudiated the contract in Texas prior to the performance date in Arkanses. The new York court ruled that the cause of action arose in Texas, where defendant anticipatorily breached the contract, rather than in Arkansas, where the contract was to be performed.[102]

Employment or Agency Contracts. When a contract of employment has been executed in one state and the employee is fired in another, the employee's cause of action arises[103] or originates[104] at the place of firing rather than the place of hiring. An analogous Mississippi case involved plaintiff's suspension from a labor union

99. 158 Iowa 507, 138 N.W. 873 (1912).

100. *Accord*, Folda Real Estate Co. v. Jacobsen, 75 Colo. 16, 223 Pac. 748 (1924).

101. 229 App. Div. 660, 242 N.Y. Supp. 676 (1st Dep't 1930).

102. *Accord*, Auglaize Box Board Co. v. Kansas City Fibre Box Co., 35 F.2d 822 (6th Cir. 1929).

103. Tandoc v. Luckenbach Steamship Co., 5 App. Div. 2d 857, 171 N.Y.S.2d 381, 382 (1st Dep't 1958).

104. Jenkins v. Thompson, 251 S.W.2d 325 (Mo. 1952).

for alleged violations of the union's constitution.[105] Although the actual suspension took place in Kansas, the Fifth Circuit Court of Appeals held that plaintiff's cause of action "accrued" in Mississippi, where the letter of suspension was received, plaintiff maintained his membership in the union, and therefore, the wrong was completed.

Only two cases involving breach of an agency contract deal with the applicability of a borrowing statute of limitations. In *Vick v. Parsons & Scoville Co.*[106] plaintiff, who was engaged in the wholesale grocery business in Indiana, hired defendant, a resident of Kentucky, as his traveling salesman. When defendant failed to make a full accounting of profits received, the Indiana court held that plaintiff's cause of action arose in Indiana, where accounts were to be settled, rather than in the foreign jurisdiction, where wholesale contracts were executed between defendant and customer. However, a contrary conclusion was reached in *Kamper v. Hunter Land Co.*[107] The defendant principal, incorporated in Minnesota, authorized plaintiff, a resident of Iowa, to sell land located in Florida. The plaintiff sued for his commission in a Minnesota court. The defendant contended that the action was barred because an appropriate Florida prescriptive period had expired. The court held for defendant, stating that an agent's cause of action arises at the place in which he exercised his authority if that place is other than the residence of his principal.

Transportation Contracts. Actions arising from contracts of carriage, either for goods or for personal transportation, pose a special problem because they may sound both in tort and contract. In *Williams v. Illinois Cent. R.R.*[108] the plaintiff purchased a ticket in Missouri and was injured in Louisiana, where her train was derailed. The Missouri court intimated that if plaintiff had elected to sue in tort, the cause of action would have "originated" in Louisiana. Missouri's borrowing statute was disregarded, however, because plaintiff alleged only a breach of contract; therefore, the action "originated" in the forum where the ticket was purchased. A different conclusion was reached under the Ohio borrowing statute, which calls for application of the law of the jurisdiction in which plaintiff's cause of action "arose."[109] In *Baltimore & O. R. Co. v. Reed*[110] plaintiff purchased a

105. Lowry v. International Bhd. of Boilermakers, 220 F.2d 546 (5th Cir. 1955).

106. 75 Ind. App. 487, 130 N.E. 877 (1921).

107. 146 Minn. 337, 178 N.W. 747 (1920).

108. 360 Mo. 501, 229 S.W.2d 1 (1950).

109. The Missouri courts borrow the law of the jurisdiction in which the cause of action "originated," MO. ANN. STAT. §516.180 (1949), and the Ohio courts the law of the jurisdiction in which it "arose," OHIO REV. CODE ANN. §2305.20 (Page 1954).

110. 223 Fed. 689 (6th Cir. 1915).

ticket in Chicago and was injured in Indiana. The Sixth Circuit Court of Appeals held that plaintiff's cause of action "arose" in Indiana, where the breach of contract or infliction of tortious injury occurred.

A similar analysis is appropriate in cases regarding loss or destruction of property in transit. If plaintiff's action is based upon the specific act which resulted in loss or destruction, his cause of action would originate or arise in the jurisdiction where the act occurred. However, if plaintiff sues for failure to deliver, his cause of action would originate or arise in the jurisdiction of the anticipated delivery.[111]

Contracts of Indemnification. The Illinois and Indiana courts have ruled that a cause of action based upon a promise of indemnification arises in the jurisdiction in which plaintiff paid defendant's indebtedness.[112] However, in *Cohn v. Krauss*[113] the Ohio court held that defendant's cross-action arose in Illinois, where various promises of indemnification were made, and ignored the fact that defendant discharged plaintiff's debt in Ohio.

Certificates of Deposit. In the only reported case involving a certificate of deposit, the Illinois court held that the plaintiff's cause of action arose in the forum where demand was made and defendant was subject to suit, not in Alaska, where defendant received the deposit and executed the certificate.[114]

Extent to Which Foreign Law Will Be Borrowed

If the requirements of a given borrowing statute are satisfied, the forum must determine the extent to which foreign law will operate locally. Most courts categorically declare that the foreign period is or is not to be applied, without asking the esoteric question — whose law are we applying? The few courts which have raised this question have consistently refused to acknowledge application of *foreign* law. Early in the history of borrowing legislation, the Texas court announced that its legislature certainly could not have "intended to give the

111. See, Merritt Creamery Co. v. Atchinson, T. & S.F. Ry., 128 Mo. App. 420, 107 S.W. 462 (1908). There are apparently no cases in point in those states having "arise" statutes. However, if plaintiff's action is based on defendant's specific act of negligence, it is clear that the cause of action arose in the jurisdiction in which damage occurred. If he sues for breach of contract, then, under the general rule, the cause arose where the contract was to be performed — the place of delivery.

112. Orschel v. Rothschild, 238 Ill. App. 353 (1925); Runkle v. Pullin, 49 Ind. App. 595, 97 N.E. 956 (1912).

113. 45 Ohio L. Abs. 148, 67 N.E.2d 62 (Ct. App. 1943).

114. Emerson v. North American Transp. & Trading Co., 303 Ill. 282, 135 N.E. 497 (1922).

laws of a foreign country, *proprio vigore*, any force or validity here."[115] The law of the forum is "all prevailing,"[116] the foreign law "borrowed" is not exclusive,[117] and foreign law is recognized only as an additional prescriptive period available to defendant[118] if it is pleaded.[119] A Missouri court pointed out that its borrowing statute "does not make the statute of limitations of a foreign state that to be applied in this state, but makes that statute the statute of Missouri."[120] The question then arises as to how much of the foreign law becomes domestic law by virtue of the forum's borrowing statute.

A majority of the courts begin with the basic proposition that the borrowed prescriptive period is applied with all its accouterments, regardless of whether they be in the form of additional statutory provisions or interpretive judicial decisions.[121] Ohio is apparently the only jurisdiction in which the courts borrow only one law — the specific foreign statutory period.[122] The Ohio position suggests the possibility of two reasonable interpretations of borrowing legislation, both of which were perspicuously delineated by Judge Hand in *Irving Nat'l Bank v. Law*.[123] A borrowing statute may mean that a defendant sued in the forum should not be exposed to a longer *period* of limitation than that in the jurisdiction where the cause of action arose.

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115. Hays v. Cage, 2 Tex. 501, 506 (1847).

116. Western Coal & Mining Co. v. Hilvert, 63 Ariz. 171, 180, 160 P.2d 331, 335 (1945).

117. Perry v. Robertson, 93 Kan. 703, 150 Pac. 223 (1915).

118. Bahn v. Fritz's Estate, 92 Mont. 84, 10 P.2d 1061 (1932); Isenberg v. Rainier, 145 App. Div. 256, 130 N.Y. Supp. 27 (1st Dep't 1911).

119. Garrison v. Newman, 220 App. Div. 498, 227 N.Y. Supp. 78 (1st Dep't 1928), in which one cause of action arose in Brazil, the other in Philadelphia, and both parties were non-residents of New York at all times involved. Defendant did not plead the statute of limitations of either foreign jurisdiction, and the New York court disregarded its borrowing statute.

120. Christner v. Chicago, R. I. & P. Ry., 228 Mo. App. 220, 223, 64 S.W.2d 752, 754 (1933). *Accord*, Alropa Corp. v. Smith, 240 Mo. App. 376, 199 S.W.2d 866 (1947).

121. *E.g.*, American Surety Co. v. Gainfort, 219 F.2d 111 (2d Cir. 1955); Nolan v. Transocean Air Lines, 173 F. Supp. 114 (S.D.N.Y. 1959); Holderness v. Hamilton Fire Ins. Co., 54 F. Supp. 145 (S.D. Fla. 1944); Minniece v. Jeter, 65 Ala. 222 (1880). When a foreign statute of limitations is borrowed, "it is not wrenched bodily out of its own setting, but taken along with it are the court decisions of its own state which interpret and apply it, and the companion statutes which limit and restrict its operation. This we think is the general law." Devine v. Rook, 314 S.W.2d 932, 935 (Mo. App. 1958), 37 TEXAS L. REV. 911 (1959).

122. Wade v. Lynn, 181 F. Supp. 361 (N.D. Ohio 1960); Payne v. Kirchwehm, 141 Ohio 384, 48 N.E.2d 224 (1943); Bowers v. Holabird, 51 Ohio App. 417, 1 N.E.2d 326 (1935). See Palmieri v. Ahart, 111 Ohio App. 195, 167 N.E.2d 353 (1960), declaring that borrowing statutes have been "universally" construed not to include the borrowing of foreign tolling provisions.

123. 9 F.2d 536, 537 (2d Cir. 1925), *aff'd on rehearing*, 10 F.2d 721 (1926).

On the other hand, the statute may mean that defendant should not be suable in the forum if, at the time of suit, he could not be sued in the state where the cause of action arose. If the former interpretation is proper, only the foreign period should be borrowed; if the latter is correct, all appropriate foreign tolling provisions should also be borrowed.

Assume that plaintiff and defendant resided in State *A* when plaintiff's cause of action arose, that the appropriate State *A* statute of limitation requires litigation within ten years, and that State *A* has a typical absent defendant tolling provision. Nine years after the cause of action arose, defendant moved to the forum where plaintiff eventually brought suit nine years later. Though a total period of eighteen years has elapsed, the defendant had been present in State *A* for only nine years. If the forum borrows only State *A*'s ten year period, plaintiff's action clearly will fail. However, plaintiff can still maintain suit in State *A* because of its absent defendant statute; therefore, if the court considers this fact decisive, he may be allowed to sue in the forum.

Most courts would conclude, in the case hypothesized, that plaintiff could maintain his action in the forum because all pertinent foreign law should be borrowed. However, this general rule is subject to several refinements depending upon the particular "law" involved. Whenever a defendant pleads stale demand, the court must select an appropriate statutory period. If plaintiff's action is characterized as one for breach of a sealed contract, the period may be twenty years; but if the seal is disregarded, the period may be ten years. Once the appropriate statutory period is selected, the court must determine when it began running. Additional questions may arise as to whether suit was commenced in time or whether the period has been tolled or extended. Should these issues be resolved by applying foreign or domestic law?

Which Foreign Statute of Limitations Is Applicable?

Most courts hold that a borrowing statute obligates the forum to apply the law of the appropriate foreign jurisdiction to determine which foreign statute of limitations is applicable. This rule was applied in all of the following instances. Is plaintiff's action one for breach of an oral or a written contract?[124] Is an action for malicious garnishment governed by the foreign statute dealing with malicious prosecution?[125] If an action for malicious prosecution is not specifically mentioned in the foreign jurisdiction's statutes of limitation, is its

124. Speich v. Atchison, T. & S.F. Ry., 178 Ill. App. 266 (1913); Jenkins v. Thompson, 251 S.W.2d 325 (Mo. 1952).

125. Brown v. Westport Finance Co., 145 F. Supp. 265 (W.D. Mo. 1956).

general tort statute of limitation applicable?[126] Is an action for per diem demurrage governed by a foreign statute relating to penal actions?[127] Is a husband's suit for loss of his wife's services controlled by the statute relating to property rights or by the statutory period for personal injuries?[128] If a workmen's compensation insurance carrier sues to recover the amount paid to an injured employee, is the carrier enforcing a property right or a right to maintain a derivative action for personal injuries?[129] Is an action for malpractice governed by a tort or a contract statute of limitations?[130] Will a contractual period of limitation control rather than the appropriate statutory period?[131] In all of these cases the forum applied the foreign prescriptive period which the foreign court would have applied.

The Ohio courts, however, hold that the selection of the appropriate limitation statute is made according to *domestic* law, although the choice is between two *foreign* statutory periods. This rule may be illustrated by a comparison of three cases arising from the Florida land boom involving the same issue — whose law determines which statute of limitations is applicable in an action alleging breach of a sealed contract? In *Alropa Corp. v. Rossee,*[132] the Fifth Circuit Court of Appeals held first, that the forum's statute of limitations governed as a part of its procedural law, and second, that the "Georgia definition of a sealed instrument is a part of its limitation statute" and is applicable as an additional "procedural" rule.[133] Georgia has no borrowing

126. Jenkins v. Thompson, 251 S.W.2d 325 (Mo. 1952).

127. Frizell Grain & Supply Co. v. Atchison, T. & S.F. Ry., 201 S.W. 78, 79 (1918). See also Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp., 179 F. Supp. 163 (S.D.N.Y. 1959).

128. Heinzelman v. Union News Co., 275 App. Div. 931, 300 N.Y. 444, 92 N.E.2d 37 (1st Dep't 1950); Palmieri v. Ahart, 111 Ohio App. 489, 167 N.E.2d 353 (1960).

129. State Compensation Ins. Fund v. Proctor & Schwartz, Inc., 102 F. Supp. 451 (E.D. Pa. 1952).

130. Lindsay v. Woodward, 5 Utah 2d 183, 299 P.2d 619 (1956).

131. In Holderness v. Hamilton Fire Ins. Co., 54 F. Supp. 145 (S.D. Fla. 1944), plaintiff sued under a North Carolina fire insurance policy which contained a contractual one year period of limitation. Such a limitation is void in Florida, but it was enforced by the federal district court in Florida because, first, the Florida borrowing statute requires that all foreign laws be borrowed, and second, the contractual limitation must be recognized as a matter of federal constitutional law. *Contra,* Asel v. Order of United Commercial Travelers of America, 355 Mo. 658, 197 S.W.2d 639 (1946). The decision of the Supreme Court in Home Ins. Co. v. Dick, 281 U.S. 397 (1930), would seem to be controlling in most cases involving this issue.

132. 86 F.2d 118 (5th Cir. 1936).

133. Alropa Corp. v. Rossee, *supra* note 132, at 119. See Gaffe v. Williams, 68 Ga. App. 299, 22 S.E.2d 765 (1942), for a Georgia state court decision applying these rules.

statute, and both holdings in the *Rossee* case are supported by precedent from other jurisdictions having no borrowing legislation.[134] Ohio does have such a statute, but in *Alropa Corp. v. Kirchwehm*[135] the Ohio Supreme Court adopted the same rule which was applied in the *Rossee* case to determine which law controls the effect of a seal for limitations purposes. According to the Ohio statute, the "laws" of the foreign jurisdiction in which the cause of action arose are operative to bar a "like cause of action" in the forum.[136] Construing this statute, the Ohio court concluded that if a seal is relevant only in regard to the issue of limitations, a question of procedure is involved and the forum must determine the procedural effect of a seal. Since the domestic limitation statute concerning "specialties" did not apply to contracts bearing a "private" seal, the Florida prescriptive period for unsealed contracts was borrowed.[137] The end result of the *Kirchwehm* case was to bar an action which would not otherwise have been barred by either the Ohio or Florida statutes of limitation.[138] The Ohio statute barred actions on written contracts after the expiration of fifteen years, and since suit was commenced within approximately seven years, plaintiff could have recovered in Ohio had his cause of action arisen in that state. If he had sued in Florida, where his cause of action did in fact arise, the Florida court would have applied its twenty-year period for sealed contracts and recovery would have been permitted. However, since suit was commenced in Ohio, and the forum's characterization resulted in application of a Florida prescriptive period which would not have been appropriate in that state, plaintiff was denied the right to enforce his cause of action. In *Alropa Corp. v. Smith*[139] a Missouri court refused to reach such an anomalous conclusion. The court properly held that the law of Florida, not that of Missouri, should determine which Florida statute of limitations was applicable. Both the Ohio and Missouri borrowing statutes require that the "laws" of an appropriate foreign jurisdiction be applied, but only the Missouri court concluded that laws means laws.[140]

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134. Burns Mortgage Co. v. Hardy, 94 F.2d 477, 480-81 (1st Cir. 1938); Mandru v. Ashby, 108 Md. 693, 71 Atl. 312 (1908); Coral Gables, Inc. v. Christopher, 108 Vt. 414, 189 Atl. 147 (1937). See generally, Bank of the U.S. v. Donnally, 33 U.S. (8 Pet.) 361 (1834).

135. 138 Ohio St. 30, 33 N.E.2d 655, *appeal dismissed*, 313 U.S. 549 (1941).

136. OHIO REV. CODE ANN. §2305.20 (Page 1954).

137. Alropa Corp. v. Kirshwehm, *supra* note 135.

138. See, Nordstrom, *Ohio's Borrowing Statute of Limitations—A Quaking Quagmire in a Dismal Swamp*, 16 OHIO ST. L.J. 183, 194 (1955); Note, 36 ILL. L. REV. 468 (1941).

139. 199 S.W.2d 866 (Mo. App. 1947).

140. See MO. ANN. STAT. §516.180 (1949); OHIO REV. CODE ANN. §2305.20 (Page 1954).

Whose Law Determines When the Foreign Prescriptive Period Began to Run?

Once the forum has selected the appropriate foreign statutory period, it must determine when that period began to run. The few cases in point conclude that foreign law should be borrowed, and this conclusion has been reached without discussion as to whether a "procedural" or a "substantive" rule is involved.[141]

Whose Law Determines Whether Action Was Commenced Before the Foreign Statutory Period Expired? In resolving this issue, several courts have reverted to the common law dichotomy between substantive and procedural rules instead of seeking a solution which is consistent with the terms and intent of borrowing legislation. In those cases holding that local rules are applicable, the courts have argued that "the question is purely one of remedy and procedure governed by the law of the forum."[142] However, those courts applying foreign law look only to the forum's borrowing statute and are not troubled by the question of whether they are applying a procedural or a substantive rule.[143] The primary area of dispute involves application of "journey's account" statutes,[144] which give plaintiff additional time to

141. Sylvania Elec. Products, Inc. v. Barker, 228 F.2d 842 (1st Cir. 1955); *In re* Superior's Estate, 211 Minn. 108, 300 N.W. 393 (1941) (involving the question of when the statute of limitations began to run against a cause of action for personal services — as the services were rendered, or when the alleged employer died); Klemme v. Long, 184 Minn. 97, 237 N.W. 882 (1931) (in which the forum applied Iowa law to determine whether a cause of action for fraud became subject to limitations when the fraud was perpetrated, or not until it was discovered); Thompson v. Lyons, 281 Mo. 430, 220 S.W. 942 (1920); Shannon v. Shannon, 193 Ore. 575, 238 P.2d 744 (1951) (*semble*).

142. Collins v. Manville, 170 Ill. 614, 617, 48 N.E. 914, 915 (1897). *Accord*, Knight v. Moline E.M. & W. Ry., 160 Iowa 160, 140 N.W. 839 (1913), in which the Iowa court held that an amendment, allowed after the Illinois prescriptive period had elapsed, related back as a matter of Iowa law to the time plaintiff's complaint was filed, which was before the Illinois period had fully run. See also Slater v. Roche, 148 Iowa 413, 126 N.W. 925 (1910); Drummy v. Oxman, 280 App. Div. 800, 113 N.Y.S.2d 224 (2d Dep't 1952).

143. *E.g.*,Wilt v. Smack, 147 F. Supp. 700 (E.D. Pa. 1957); Stanley v. Bird 85 F. Supp. 358 (W.D. Ky. 1949); Casner v. San Diego Trust & Sav. Bank, 34 Cal. App. 2d 524, 94 P.2d 65 (1939). In Gibson v. Womack, 218 Ky. App. 626, 291 S.W. 1021 (1927), plaintiff's action was commenced either on the last possible day under the West Virginia statute of limitations or one day late, depending upon whether the Kentucky or West Virginia method of computation was to be used. The West Virginia method was applied.

144. Historically, a "journey's account" was a period "allowed to permit a party, whose action had abated for matter of form, a reasonable time within which to journey to court to sue out a new writ." Baker v. Cohn, 266 App. Div. 236, 239, 41 N.Y.S.2d 765, 767 (1st Dep't 1943). Modernly, the purpose of such statutes is to permit a diligent plaintiff to continue his action if dismissed without fault

sue if a timely suit is dismissed through no fault of his own. In *Fowler v. Herman*[145] plaintiff was injured in Alabama and filed suit in Tennessee within the one-year Alabama period. The defendant could not be served in Tennessee, and a voluntary nonsuit was entered. After one year had elapsed, but within the extension period granted by the Tennessee tolling provision, defendant was found in the forum and a new suit was filed. The plaintiff was permitted to recover notwithstanding the lapse of one year, because under the *Tennessee* statute his action was commenced when the first complaint was filed.[146] In a case involving essentially the same facts, a federal court in Pennsylvania also held that suit was timely, but reached this conclusion on the basis of Delaware's journey's account statute rather than the law of the forum.[147] The Pennsylvania decision was properly based on an interpretation of the local borrowing statute, the purpose of which is "simply to insure that a plaintiff who sues in Pennsylvania obtains thereby no greater rights than those given in the state where his cause of action arose . . . ."[148]

Whose Law Determines Whether the Foreign Period Has Been Tolled or Extended? The courts have consistently held that the forum should look to the law of the appropriate foreign jurisdiction to determine whether the borrowed statutory period has been tolled or extended by reason of part payment,[149] acknowledgment of a debt,[150] death of the debtor,[151] notice given to a tort-feasor,[152] or infancy of the plaintiff.[153] With the exception of Ohio,[154] the courts

on his part, when the prescriptive period expired while the initial action was pending.

145. 292 S.W.2d 11 (Tenn. 1956).

146. The Missouri courts also apply the rule illustrated by the *Fowler* case. Wright v. N.Y. Underwriters' Ins. Co., 1 F. Supp. 663 (W.D. Mo. 1932); Turner v. Missouri-Kan.-Tex. R.R., 346 Mo. 28, 142 S.W.2d 455 (1940).

147. Wilt v. Smack, 147 F. Supp. 700 (E.D. Pa. 1957).

148. *Id.* at 704. *Accord*, Momand v. Universal Film Exchanges, Inc., 172 F.2d 37 (1st Cir. 1948); Stanley v. Bird, 85 F. Supp. 358 (W.D. Ky. 1949); Fulkerson v. American Chain & Cable Co. Inc., 72 F. Supp. 334 (W.D. Pa. 1947).

149. *E.g.*, King v. Fay, 169 F. Supp. 934 (D.D.C 1958); Casner v. San Diego Trust & Sav. Bank, 34 Cal. App. 2d 524, 94 P.2d 65 (1939); Theis v. Wood, 238 Mo. 643, 142 S.W. 431 (1911) (holding that plaintiff's action was barred since attempted part payment in Kansas did not toll limitations according to Kansas law, although it would have according to the law of the forum); Butler v. Merchants Nat'l Bank, 325 S.W.2d 229 (Tex. Civ. App. 1959) (*semble*).

150. Glenn v. McDavid, 316 Ill. App. 130, 44 N.E.2d 84 (1942).

151. *Ibid.*

152. Burkhardt v. Northern States Power Co., 180 Minn. 560, 231 N.W. 239 (1930).

153. Nolan v. Transocean Air Lines, 276 F.2d 280 (2d Cir. 1960); Hilliard v. Pennsylvania R.R., 73 F.2d 473 (6th Cir. 1934); Moore v. Roschen, 93 F. Supp. 993 (S.D.N.Y. 1950); Handlin v. Burchett, 270 Mo. 114, 192 S.W. 1016 (1917).

154. Wade v. Lynn, 181 F. Supp. 361 (N.D. Ohio 1960); Payne v. Kirchwehn,

have also looked to the law of the jurisdiction in which the cause of action arose to determine whether defendant's absence from that state should operate to toll the running of the borrowed period. In some cases defendant's absence from the foreign state having primary contact with plaintiff's cause of action did not operate to toll the borrowed period, either because the state referred to had no absent defendant statute[155] or because defendant's absence was insufficient under the borrowed law.[156] In other cases defendant's absence from the jurisdiction in which the cause of action arose was sufficient under the borrowed law to toll the appropriate prescriptive period.[157] For example, in *Colello v. Sundquist*[158] a federal court in New York borrowed the Connecticut statute of limitations. Because of defendant's residence in New York, it was necessary to determine what effect his absence from Connecticut might have on the running of the borrowed Connecticut statute. This issue was resolved by applying the Connecticut rule that absence does not toll a prescriptive period if service of process is available according to the provisions of the Connecticut non-resident motorist statute. Judgment was accordingly granted in favor of the defendant. In *Hill v. Schantz*,[159] involving essentially the same factual pattern, the court again looked to the law of a sister state, but judgment was granted for plaintiff because absence did toll the New Jersey statute of limitations, even though service of process was available under the New Jersey non-resident motorist statute. Thus, regardless of whether the foreign absent defendant statute would or would not interrupt the running of the borrowed period, the courts have applied the foreign law.

Ohio is the only state specifically holding that a foreign limitation period is borrowed without its supplemental tolling provision relating to defendant's absence.[160] This conclusion is difficult to rationalize from the face of the Ohio borrowing statute, which states only that

141 Ohio 384, 48 N.E.2d 224 (1943); Palmieri v. Ahart, 111 Ohio App. 195, 167 N.E.2d 353 (1960).

155. First Nat'l Bank v. Hurlburt, 224 Ill. App. 297 (1922). In Timmonds v. Messner, 109 Kan. 518, 200 Pac. 270 (1921), the forum held that plaintiff's action was barred by the Colorado statute of limitations due to lack of any absent defendant statute in Colorado; the court indicated that this result should be reached, even though absence would toll the domestic period.

156. Bertha Bldg. Corp. v. National Theatres Corp., 140 F. Supp. 909 (E.D.N.Y. 1956); McGrath v. Helena Rubinstein, Inc., 29 F. Supp. 822 (S.D.N.Y. 1939).

157. *E.g.*, American Surety Co. v. Gainfort, 219 F.2d 111 (2d Cir. 1955); Holderness v. Hamilton Fire Ins. Co., 54 F. Supp. 145 (S.D. Fla. 1944); Chaloupka v. Martin, 179 Iowa 1173, 162 N.W. 567 (1917).

158. 137 F. Supp. 649 (S.D.N.Y. 1955).

159. 10 App. Div. 2d 628, 196 N.Y.S.2d 356 (2d Dep't 1960).

160. *E.g.*, Hilliard v. Pennsylvania R.R., 73 F.2d 473 (6th Cir. 1934); Wade v. Lynn, 181 F. Supp. 361 (N.D. Ohio 1960); Palmieri v. Ahart, 111 Ohio App. 195, 167 N.E.2d 353 (1960).

plaintiff's cause of action shall be barred in Ohio "if the *laws* of any state . . . where a cause of action arose limit the *time* for the commencement of the action to a *lesser number of years* than do the statutes of this state in like causes of action . . . ."[161] The words *time* and *lesser number of years* seem to suggest that only the foreign period is to be borrowed. But if State *X* also has an absent defendant tolling provision, the number of years provided for by the appropriate statute of limitations in State *X* is necessarily affected by defendant's absence from that state. Thus it appears that the Ohio borrowing statute calls for a computation of the foreign limitation period as affected by the tolling provision.

The justification given for disregarding foreign absent defendant provisions is based on the idea that only one prescriptive period can be applied. "The statute of limitations is not a will-o'-the-wisp that can fly from one state to another as fancy dictates."[162] The forum is to apply either the Ohio limitation period or that of the sister state involved. If the foreign period is to be applied, it then becomes the Ohio period. From this it is argued:[163]

> "It would indeed be an anomalous bit of logic to hold that although the defendant has been in Ohio and therefore subject to an action by the plaintiff in this forum, nevertheless the statute of limitation has been prevented from running against the plaintiff in Ohio for no other reason than that the defendant has been absent from Florida."

Basically, this problem arises from the necessity of making a choice between two conflicting policy considerations. On the one hand, it would seem that a plaintiff's action should not be barred by the prescriptive period of a state in which defendant was not subject to suit for the entire statutory period. Why should plaintiff's action be barred by a ten-year period of limitation borrowed from State *X* if defendant could not have been sued in that state during the last three years of the ten-year period? On the other hand, why should defendant be subject to suit in the forum if plaintiff has had ample time to litigate in the forum, or in a foreign jurisdiction, but has failed to do so? Suppose defendant has resided in three different states and the appropriate statute of limitations is ten years in each. If he has resided in

161. OHIO REV. CODE ANN. §2305.20 (Page 1954). (Emphasis added.)

162. Bowers v. Holabird, 51 Ohio App. 413, 416, 1 N.E.2d 326, 328 (1935).

163. Payne v. Kirchwehm, 141 Ohio St. 384, 387, 48 N.E.2d 224, 226 (1943). Judge Bell, dissenting, argued that "it was not the purpose or intent of the General Assembly to make [our borrowing statute] . . . the vehicle for borrowing a statute of limitation of another state to bar an action in Ohio unless such borrowed statute would also bar the action if prosecuted in that state." 141 Ohio St. at 396, 48 N.E.2d at 229.

each state for nine years and foreign absent defendant tolling provisions are borrowed by the forum, plaintiff's suit is timely although a total period of twenty-seven years has elapsed. Defendant has migrated from the jurisdiction in which the cause of action arose, but is there any hardship to plaintiff in requiring him to sue within ten years regardless of where defendant is amenable to suit? Is the judicial process so sterile that plaintiff cannot adequately present his claim in a jurisdiction other than that in which it arose and do so within a reasonable time? It must be conceded that the Ohio rule encourages prompt litigation and does not extend the period of defendant's judicial liability merely because he failed to remain in one jurisdiction for its full prescriptive period.

Borrowing a Longer Period of Limitation

Although a cause of action has all its initial contacts with a sister state, the forum may apply its own prescriptive period, which normally begins to run when defendant first becomes amenable to the jurisdiction of its courts.[164] Two questions may arise. If the forum has a borrowing statute, will a borrowed foreign period apply to the exclusion of the domestic period? If defendant may plead either the local or the foreign period, should plaintiff's action be dismissed if it is barred by local law but is timely according to the more liberal foreign law? The courts seem to resolve these problems by asking whether borrowing legislation is intended to "enlarge" the forum's own limitation period.[165] But is this approach proper? The basic inquiry would seem to be whether borrowing legislation has reversed the common law rule that statutes of limitation are merely procedural matters, governed by domestic law. In view of the enactment of borrowing statutes calling for application of a foreign prescriptive period, are statutes of limitation now to be characterized as "substantive"? Or are statutes of limitation still regarded as "procedural,"

164. In Millar v. Hilton, 189 Mich. 635, 155 N.W. 574 (1915), arising in one of the jurisdictions not having a borrowing statute, the court held that defendant could not tack his period of residence in a foreign jurisdiction onto his period of residence in the forum. In Perry v. Robertson, 96 Kan. 83, 150 Pac. 223 (1915), the court simply stated that its own statute of limitations began to run when defendant came into the state. Plummer v. Lowenthal, 165 N.Y. Supp. 220 (Sup. Ct., Att. T. 1917), held that the New York absent defendant tolling provision operated to prevent the forum's period from running until defendant entered New York. All three cases reached the same conclusion, but the reasoning was slightly different in each.

165. *E.g.*, Gaier & Stroh Millinery Co. v. Hilliker, 52 Okla. 74, 152 Pac. 410 (1915); Newell v. Harrison Eng'r & Constr. Corp., 149 Kan. 838, 840, 89 P.2d 869 (1939) (dictum).

thus necessitating application of domestic limitations unless borrowing legislation has created an exception? If the former interpretation is correct and the forum's borrowing statute is applicable, it follows that the "substantive" limitation rules of the foreign jurisdiction should be applied to the exclusion of local rules — regardless of whether the foreign period is longer than the appropriate domestic period. If the latter interpretation is correct, the foreign "procedural" rule might be applied, but not necessarily to the exclusion of the domestic limitation period.

Only six states have legislation clearly indicating that foreign law is not to be borrowed if it provides for a prescriptive period longer than that of the forum.[166] With or without such legislation, the prevailing rule calls for application of a foreign limitation period only if it is shorter than the domestic period.[167] If the forum's period has expired, plaintiff's action is barred even though it is not barred by the law of the jurisdiction in which the cause of action had its initial contact.[168] The only deviation from this rule is found in Kentucky, where plaintiff's action has been held timely if prosecuted within the foreign period, although the Kentucky period has already expired.[169] However, neither the Kentucky cases nor those applying the prevailing rule have discussed the effect of borrowing legislation on the characterization of statutes of limitation as either substantive or procedural. Should such legislation evoke a substantive characterization? It might be argued that statutes of limitation should be characterized as substantive, particularly in a jurisdiction calling for application of a foreign period by way of its borrowing statute. However, one reason for enactment of borrowing legislation is to encourage

166. The following three statutes specifically permit the forum to borrow only a shorter foreign period: DEL. CODE ANN. tit. 10, §8120 (1953); KY. REV. STAT. ANN. §413.320 (1955); OHIO REV. CODE ANN. §2305.20 (Page 1954). The other three statutes in this group provide only that an action may be barred by either the law of the forum or of the appropriate foreign jurisdiction. By necessary implication, the shorter of the two periods is to be applied. N.Y. CIV. PRAC. ACT §13; VA. CODE ANN. §8-23 (1957); W. VA. CODE ANN. §5409 (1955).

167. *E.g.*, Bonsant v. Rugo, 190 F. Supp. 958 (D. Mass. 1961); Pack v. Beech Aircraft Corp., 50 Del. 413, 132 A.2d 54 (1957); Gaffney v. Unit Crane & Shovel Corp., 49 Del. 395, 117 A.2d 237 (1955); Brown v. Case, 80 Fla. 703, 86 So. 684 (1920).

168. *E.g.*, Panhandle E. Pipe Line Co. v. Parish, 168 F.2d 238 (10th Cir. 1947); Brown v. Case, *supra* note 167; Farthing v. Sams, 296 Mo. 442, 247 S.W. 111 (1922); Kahn v. Commercial Union of America, Inc., 227 App. Div. 82, 237 N.Y. Supp. 94 (1st Dep't 1929).

169. See Ley v. Simmons, 249 S.W.2d 808 (Ky. 1952); Smith v. Baltimore & O. R.R., 157 Ky. 113, 162 S.W. 564 (1914); Louisville & N. R.R. v. Burkhart, 154 Ky. 92, 157 S.W. 18 (1913); John Shillito Co. v. Richardson, 102 Ky. 51, 42 S.W. 847 (1897). See also Koeppe v. Great Atl. & Pac. Tea Co., 250 F.2d 270 (6th Cir. 1957).

timely litigation, even in cases where defendant meanders from state to state. If the courts are to effectuate this policy, the forum should be permitted to bar plaintiff's action by its own prescriptive period, if properly applicable, although this might entail non-recognition of the issue as to whether statutes of limitation are substantive or procedural when a borrowing statute is to be applied.

Problems of Judicial Interpretation Peculiar to Specific Groups of Borrowing Statutes

Maximum Periods for Enforcement of Foreign Actions

Few legislative attempts have been made to prescribe a maximum period of time within which a foreign cause of action must be litigated in the forum.[170] In the normal case where defendant does not continually shift his residence from one state to another, perhaps such a maximum period is unnecessary. Assume that the period of limitation is ten years in both the forum and State *A*, where defendant's liability arose. If defendant lived in State *A* for eight years before moving to the forum, where he resided for ten years, plaintiff's action is barred in the forum. Since the forum's own prescriptive period begins to run when defendant first becomes a resident, domestic limitation rules do, in a sense, operate as a maximum period within which foreign causes of action must be litigated. The "maximum" period would be eighteen years. Suppose, however, that defendant resided for eight years in State *A*, twelve years in State *B*, and ten years in the forum. If the forum refuses to borrow the prescriptive period of State *B*, but does borrow the statute of limitations of State *A and* its absent defendant tolling provision, the maximum period in the forum would be thirty years. To prevent such a case from arising, one of two solutions might be adopted. First, the forum could borrow only State *A*'s prescriptive period and disregard its absent defendant statute. Thus, the maximum period of limitation in the forum would be ten years. Second, the forum could apply the prevailing rule, which calls for application of State *A*'s absent defendant statute, but establish a maximum number of years for enforcement of foreign causes of action. The Colorado legislation, on its face, appears

170. In Connecticut, one of the states having no borrowing statute, a specific maximum period for enforcement of foreign actions has been established by the Connecticut absent defendant tolling provision. According to Conn. Gen. Stat. Rev. §52-590 (Supp. 1959), the time during which defendant is outside the state is to be excluded from the computation of the approximate limitation period, but the time so excluded is not to exceed seven years. In jurisdictions having borrowing statutes, Colo. Rev. Stat. Ann §87-1-22 (1953), Hawaii Rev. Laws §241-6 (1955), and Wyo. Stat. Ann. §1-16 (1957) specifically provide for a maximum period in regard to enforcement of foreign actions.

to adopt the latter solution. Section 87-1-22 of the Colorado Revised Statutes Annotated of 1953, which immediately follows Colorado's borrowing statute, reads as follows:

> "It shall be lawful for any person against whom an action shall be commenced in any court of this state, wherein the cause of action accrued without this state . . . more than six years before the commencement of the action in this state, to plead the same in bar of the action in this state . . . ."

In *Kelly v. Heller*[171] the Colorado court interpreted section 22 literally, holding that causes of action accruing in other states are barred if more than six years has elapsed since the date of accrual. However, in *Simon v. Wilnes*[172] the court overruled *Kelly v. Heller* by holding that plaintiff's action must be "fully barred" by the law of the jurisdiction in which it accrued *and* six additional years must have elapsed. Since the court was convinced that section 22 should not be read literally, it might have held that the maximum period for enforcement in the forum is to be computed by adding six years to the number of years provided for by the appropriate foreign limitation statute. In either of the hypothetical cases suggested at the beginning of this section, such an interpretation would require suit within sixteen years. The court held, however, that plaintiff's action must be fully barred under the foreign law, which would necessarily invoke reference to foreign absent defendant tolling provisions. In both hypotheticals, plaintiff's action would not be "fully barred" in State *A* because of defendant's absence from that state following his eight years of residence. Thus, under *Simon v. Wilnes* plaintiff's action would not be barred until defendant had resided in Colorado for the full domestic period. In the first hypothetical, plaintiff could sue at any time within a total period of eighteen years; in the second, his action would not be barred for thirty years. There has been no reduction of the period for enforcement of foreign actions, although section 22 was enacted for this purpose.

Another incongruity appears when *Simon v. Wilnes* is compared with Colorado's borrowing statute.[173] Even though plaintiff's action is fully barred by foreign law, the majority in *Simon v. Wilnes* held that it is not barred in Colorado for an additional six years. The concurring opinion correctly suggested that the borrowing statute

171. 74 Colo. 470, 222 Pac. 648 (1924).

172. 97 Colo. 78, 47 P.2d 406 (1935).

173. "When a cause of action arises in another state . . . and by the laws thereof an action thereon cannot be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state." COLO. REV. STAT. ANN. §87-1-21 (1953).

and section 22 should be construed together,[174] but the dissenting opinion properly added that they should be made to harmonize, and not to impose an additional six-year period after the action has been fully barred by foreign law.

The Colorado experience illustrates the difficulty which courts might have when legislatures attempt to establish specific maximum periods for enforcement of foreign causes of action. Perhaps a slight modification of section 22, combined with the Ohio rule that absent defendant tolling provisions are not to be borrowed, would produce the result intended by the Colorado legislature.[175] If, for instance, the Colorado court had held that *only* the foreign period is to be borrowed, but an additional six years is to be added to that period, plaintiffs would be given a reasonable time within which to sue, and the period of defendant's judicial responsibility would not be unduly extended merely because he failed to stay put.

Residence Requirements

All but eight borrowing statutes contain express requirements relating to the residence of either plaintiff or defendant.[176] Even in the absence of statutory language concerning residence, this factor has been considered to be of some significance. For example, the Illinois borrowing statute imposes no residence requirements, but the courts of that state have held that foreign limitations are not to be borrowed unless both plaintiff and defendant were non-residents when the cause of action arose.[177] By liberally interpreting the statutory requirement calling for application of the laws of the state in which plaintiff's action "arose," the Illinois courts have also held that plaintiff's action is barred by the laws of a jurisdiction in which defendant has resided, although he was not a resident of that state when his obligation matured or became due.[178]

Exceptions Favoring Resident or Citizen Plaintiffs. At least twelve states have borrowing statutes which expressly or impliedly create an exception favoring a resident or citizen plaintiff.[179] The California

174. Simon v. Wilnes, 97 Colo. 78, 84, 47 P.2d 406, 409 (1935).

175. Notwithstanding "vigorous attack" by defendant's counsel, *Simon v. Wilnes* has been accepted, with little discussion, as the law of Colorado. Newton v. Mann, 111 Colo. 76, 137 P.2d 776 (1943).

176. See Appendix A.

177. *E.g.*, Orschel v. Rothschild, 238 Ill. App. 353 (1925); Chicago Mill & Lumber Co. v. Townsend, 203 Ill. App. 457 (1916); Delta Bag Co. v. Frederick Leyland & Co., 173 Ill. App. 38 (1912).

178. See cases cited in Notes 87-89 *supra*.

179. See Appendix A. Those statutes specifically requiring that both plaintiff and defendant be non-residents might also operate to the advantage of a

statute is typical. An action barred by the laws of the jurisdiction in which it arose cannot be maintained in California "except in favor of one who has been a citizen of this state, and who has held the cause of action from the time it accrued."[180] Under such statutes, plaintiff's residence or citizenship in the forum precludes a plea of foreign limitations, even though the period of an appropriate foreign state has fully run.[181] Since defendant may rely only on the forum's prescriptive periods, it is immaterial that he has resided for thirty or forty years in the state where plaintiff first became entitled to sue. Moreover, if defendant is not a resident of the forum, he may not plead the domestic period. Even if he should become a resident, the forum will apply its absent defendant statute and will subtract from its computation the period of defendant's non-residence.[182] On the other hand, plaintiff's residence or citizenship in the forum is immaterial in those states having no residence exception in their borrowing statutes,[183] and action may be barred by appropriate foreign law, although it would not have been barred had the action initially had its contacts with the forum.[184]

Merely to state the problem involved raises doubts as to the constitutionality of such resident or citizen exceptions. In one jurisdiction having a *resident* plaintiff exception, the state court held the provision constitutional simply because it did not abridge the privileges and immunities secured to the *citizens* of the several states.[185] However, the United States Supreme Court has unanimously declared that Minnesota's *citizen* plaintiff exception is constitutional.[186] After expressing reluctance to declare unconstitutional a statute that had

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resident plaintiff. *E.g.*, Fenton v. Sinclair Ref. Co., 283 P.2d 799 (Okla. 1955).

180. CAL. CIV. PROC. CODE §361.

181. *E.g.*, Stewart v. Spaulding, 12 Cal. 264, 13 Pac. 661 (1887). However, such plaintiff exceptions do not operate to prevent a non-resident defendant from pleading a foreign "built-in" statute of limitation. Pack v. Beech Aircraft Corp., 50 Del. 413, 132 A.2d 54 (1957).

182. *E.g.*, Laurencelle v. Laurencelle, 217 App. Div. 159, 216 N.Y. Supp. 384 (2d Dep't 1926).

183. *E.g.*, Auglaize Box Board Co. v. Kansas City Fibre Box Co., 35 F.2d 822 (6th Cir. 1929); Kellum v. Robinson, 193 Iowa 1277, 188 N.W. 821 (1922); McCoy v. Chicago, B. & Q. Ry., 134 Mo. App. 622, 114 S.W. 1124 (1909). In each of these cases plaintiff was a resident of the forum, but this fact was merely mentioned in passing or given no particular weight.

184. Hunter v. Niagra Fire Ins. Co., 73 Ohio St. 110, 76 N.E. 563 (1905).

185. Klotz v. Angle, 220 N.Y. 347, 116 N.E. 24 (1917).

186. Canadian No. Ry. v. Eggen, 252 U.S. 553 (1920). Apparently overlooking the *Eggen* case, the Colorado court, by way of dictum, intimated that its citizen-plaintiff exception might be unconstitutional. Folda Real Estate Co. v. Jacobsen, 75 Colo. 16, 18, 223 Pac. 748 (1924). Although the reason for its deletion is not clear, the Colorado borrowing statute no longer has such an exception. COLO. REV. STAT. ANN. §87-1-21 (1953).

been in force for some sixty years, the Court made this statement:[187]

> "[T]he constitutional requirement is satisfied if the non-resident is given access to the courts of the State upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens . . . . A man cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his rights when he is given free access to them for a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings for their protection."

In response to the argument that the Minnesota legislature clearly discriminated in favor of its own citizens, the Court stated that "the discrimination of which he [plaintiff] complains could arise only from his own neglect."[188] If a non-resident plaintiff is given a reasonable time within which to litigate in the forum, it is constitutionally immaterial that a citizen plaintiff involved in a similar factual situation might be entitled to sue regardless of how many years had elapsed.[189]

The chauvinistic attitude reflected by such plaintiff exceptions is, in fact, directly opposed to one of the basic ideas which prompted enactment of borrowing statutes: to provide a reasonable time for plaintiffs to prosecute their actions against ambulatory defendants, but at the same time prevent the possibility of perpetual judicial liability against a defendant who shifted his place of abode but remained amenable to suit in a foreign jurisdiction for its full precriptive period. Rather than restricting a wandering defendant's liability to a reasonable time, such exceptions may operate to expose him to liability in the forum which is unlimited in duration.

Perhaps the legislators enacting the statutes involved felt that resident plaintiff exceptions would encourage immigration. However, non-resident plaintiffs are given no real incentive to move, because the exceptions apply only in favor of plaintiffs who were residents or citizens when their causes of action first arose.[190] Few potential plaintiffs would move to a state merely because the potential defendant's

187. Canadian No. Ry. v. Eggen, 252 U.S. 553, 562 (1920).

188. *Id.* at 561.

189. In Rieser v. Baltimore & O. R.R., 123 F. Supp. 44 (S.D.N.Y. 1954), several plaintiffs were involved, some being New York residents, and others non-residents. In regard to the non-resident plaintiffs, defendant could plead both the foreign and the domestic period of limitation. Against the New York plaintiffs, defendant could plead only the domestic period. Thus, in a single case, some plaintiffs were in a slightly more favorable position than others simply because they happened to be New York residents.

190. *E.g.*, CAL. CIV. PROC. CODE §361. In Lawson v. Tripp, 34 Utah 28, 95 Pac.

liability might be perpetual if he could be sued in that state. And even though a defendant might realize that plaintiff's action will not be barred in State *X*, where plaintiff is a resident, unless he starts the prescriptive period running by becoming a resident of that jurisdiction, how many defendants would move for that reason — particularly if it is doubtful whether the courts of plaintiff's residence will ever acquire jurisdiction? Since any incentive to immigrate is probably non-existent, the only reasons for such exceptions are to discriminate in favor of resident plaintiffs and eliminate the inconvenience of bringing timely suit in another state. The application of a borrowing statute, which would otherwise call for local application of some "foreign" law, is thereby narrowed in favor of a resident plaintiff. No principle of law or logic can support such a rule.

Defendant's Residence at Time of Suit. According to four borrowing statutes, the defendant must be a resident of the forum when suit is commenced.[191] The Texas statute is most explicit: "No action shall be brought against an *immigrant* to recover a claim which was barred by the law of limitation of the State or country *from which he emigrated* . . . ."[192] In addition to these four statutes, several enactments call for application of the law of the jurisdiction in which defendant has "resided" or in which he has "previously resided."[193] However, such statutes have not been construed to mean that defendant must reside in the forum when suit is commenced.[194] For example, plaintiff's action might be barred by the law of the state in which defendant has "previously resided," although defendant has never been a resident of the forum.[195] Therefore, it seems that unambiguous statutory language is necessary before the forum will permit defendant to plead foreign law only, if he has migrated to the forum.

The manner in which these four statutes are applied and the rationale which prompted enactment are obvious. If defendant is not a resident of the forum when suit is commenced, he may rely only on the domestic period of limitations; the bar created by the law of

520 (1908), plaintiff was a resident of the forum. However, the Utah citizen plaintiff exception, now found in UTAH CODE ANN. §78-12-45 (1953), was not applied because plaintiff was an assignee of the cause of action and had not held it "from the time it accrued."

191. ARIZ. REV. STAT. ANN. §12-506(A) (1956); LA. CIV. CODE ANN. art. 3532 (West 1952); MISS. CODE ANN. §741 (1942); TEX. REV. CIV. STAT. ANN. art. 5542 (1958).

192. TEX REV. CIV. STAT. ANN. art. 5542 (1948). (Emphasis added.)

193. See Appendix A, §C.

194. *E.g.*, Van Dorn v. Bodley, 38 Ind. 402 (1871); Lebrecht v. Wilcoxon, 40 Iowa 93 (1874).

195. Lebrecht v. Wilcoxon, 40 Iowa 93 (1874).

another state is immaterial.[196] It is argued that such a result encourages immigration.[197] But should a rule of law be adopted for the sole purpose of encouraging immigration? If plaintiff's action is fully barred by the law of some appropriate sister state, should it nevertheless be "timely" merely because defendant is not presently a resident of the forum? Defendant's immunity to the judgment of a court of law should not be treated so lightly, and borrowing statutes should not be manipulated by legislatures as pots of gold for the enticement of foreigners. No conflict of laws principle calls for application of foreign law only if defendant is a resident of the forum at the time of suit, and such a requirement has properly been ignored in those states having no such legislation.

Conclusion

Based on a desire to keep conflict of laws rules abreast of the increasing inclination to shift residence from one state to another, most states have enacted so-called borrowing statutes of limitation. Such legislation is necessary if ambulatory defendants are ultimately entitled to repose and if plaintiffs are to be compelled to avail themselves of judicial enforcement of their causes of action within a reasonable time. The common law rule characterizing limitation rules as procedural rather than substantive is inadequate. Since the common law calls for application of the forum's own prescriptive rules, including its provision tolling limitations while defendant is absent from the forum, a cause of action against a non-resident defendant might never be barred in the forum if defendant continues his non-resident status. Perpetual personal responsibility for a bona fide obligation is perhaps justifiable, but perpetual access to overburdened courts for the purpose of enforcing claims clouded by unreasonable lapse of time is not.

Although the policy factors prompting enactment of borrowing legislation are meritorious, the wording used by the various state legislatures has not always accomplished the objectives sought. The requirement that the cause of action have its initial contacts outside the forum might result in no repose in the forum for a defendant who has remained continually amenable to suit in a neighboring state. The legislative mandate to apply the law of that foreign jurisdiction in which plaintiff's cause of action "arose," "accrued," or "originated" often causes unnecessary confusion and obfuscation

196. *E.g.*, Fisher v. Burk, 123 Miss. 781, 86 So. 300 (1920); Robinson v. Moore, 76 Miss. 89, 23 So. 631 (1898); Louisville & N. R.R. v. Pool, 72 Miss. 413, 16 So. 753 (1895).

197. *E.g.*, Robinson v. Moore, *supra* note 196; Continental Supply Co. v. Hutchings, 267 S.W.2d 914 (Tex. Civ. App. 1954).

of policy factors underlying borrowing statutes. Exceptions created to favor resident plaintiffs or to encourage immigration to the forum are based on pride, not on justifiable policy. In addition to these instances of inept legislation, the courts have occasionally been guilty of mechanically applying a borrowing statute to a factual situation calling for more thoughtful analysis of both statute and case precedent. In short, more artfully drawn borrowing legislation is necessary.

Is the answer a characterization of statutes of limitation as rules of substantive law rather than rules of procedure? Limitations are substantive in the sense that plaintiff is denied relief once the prescribed period has expired. Since plaintiff's cause of action is extinguished as far as judicial enforcement is concerned, are limitation rules which destroy his right to obtain a judgment any less "substantive" than other rules which directly affect defendant's liability? On the other hand, limitations are procedural in the sense that they extinguish only plaintiff's remedy, not the underlying obligation. If the proper characterization is "procedural," the forum is to apply its own rules, including its absent defendant tolling provision; if "substantive," the forum applies appropriate foreign law, including the foreign absent defendant tolling provision. In either case, if defendant is a non-resident of the jurisdiction whose law is applied but was amenable to suit in another jurisdiction for its full prescriptive period, action is not barred in the forum notwithstanding the number of years which have elapsed. Regardless of whether limitations are characterized as substantive or procedural, the same inequity might result. Statutes of limitation, therefore, defy characterization according to traditional conflict of laws rules. The basic issues involved appear to be issues of policy, and perhaps policy, rather than principle, should be the guide.

Assuming that the basic policy factors involved are simply to require plaintiffs to institute suit without unreasonable delay and not to unduly extend the period of defendant's judicial responsibility merely because he moved from one state to another, how can these policies in statute and case decision be best expressed? Working within the framework of present borrowing legislation, courts have occasionally been compelled to write strained opinions containing penumbral reasoning in order to achieve a result consonant with the policy underlying such legislation. Other courts have refused to engage in legal gymnastics and have been persuaded by simple logic that the wording of the borrowing statute involved, plus the factual situation presented, can lead to only one decision, although that decision is difficult to justify on policy grounds. The most expedient solution would seem to be legislative re-evaluation of existing legislation, and nationally uniform borrowing statutes would be highly desirable. In an attempt to cope with this problem, the National Conference of

Commissioners on Uniform State Laws suggested the following statute:[198]

> "Section 1. As used in this act, 'claim' means any right of action which may be asserted in a civil action or proceeding and includes, but is not limited to, a right of action created by statute.
>
> "Section 2. The period of limitation applicable to a claim accruing outside of this state shall be either that prescribed by the law of the place where the claim accrued or by the law of this state, whichever bars the claim."

Proposed section 2 has several advantages. Residence or nonresidence in the forum is of no consequence, and prompt litigation is encouraged by the provision that either foreign or domestic law may be applied, depending upon which bars plaintiff's action. However, section 2 is applicable only to a "claim accruing outside of this state." If a cause of action accrues in the forum, but shortly thereafter defendant moves to State *A*, where he resides at the time of suit, section 2 is not applicable. The prescriptive period of State *A* can not be borrowed because plaintiff's claim accrued in the forum. The forum would apply its own limitation rules, including its absent defendant tolling provision, and plaintiff could bring suit in the forum regardless of the period of time that has elapsed. On the other hand, assume that the claim did accrue outside the forum, thus invoking section 2. Assume further that defendant has never been a resident of the forum, that the claim accrued in State *X*, where defendant resided for a portion of its prescriptive period, and that at the time of suit defendant has been a resident of State *Y* long enough to create a bar according to the laws of that state. Section 2 calls for application of the law of the forum or of State *X*, but not the law of State *Y*. If either the law of the forum or of State *X*, which would include the absent defendant tolling provision of the appropriate state, is applied, plaintiff's action is not barred in the forum, although fully barred according to the law of State *Y*. In such situations, section 2 does not compel litigation within a reasonable time. In addition to this deficiency, section 2 perpetuates present confusion by requiring the forum to determine where and how many times a cause of action "accrues."

An alternative statute was suggested, though not approved by a majority of the conference. This alternative provision imposes an additional requirement: that the forum disregard any foreign statute which might toll a borrowed period of limitation.[199] This is analogous

198. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 264 (1957).

199. "The period of limitation applicable to a claim accruing outside of

to the Ohio rule, which calls for application of an appropriate foreign *period* but disregards any absent defendant tolling provision. For example, if the claim "accrued" in State *X*, where the appropriate period is ten years, plaintiff's action will be barred in the forum if suit is not prosecuted within that period, even though defendant was a resident of State *X* for only two years. Such a rule obviously encourages prompt litigation in the forum. However, neither the alternative statute nor the Ohio rule takes cognizance of the delay in bringing suit caused by a defendant who moves from one state to another. Even the most diligent plaintiff will experience some unavoidable delay when his obligor shifts residence. If ten years is a reasonable period in which to institute suit if defendant continuously remained in State *X*, is it also a reasonable period if defendant caused unavoidable delay by emigrating from that state?

Another possible solution is to permit the forum to borrow the law of *any* jurisdiction in which defendant has remained subject to suit for the full period provided by the law of that jurisdiction.[200] The rationale underlying statutes of limitation is to compel plaintiffs to take advantage of the opportunity to sue within a reasonable period of time. Opportunity to sue necessarily involves defendant's amenability to suit, and if the forum is to apply the law of any jurisdiction in which defendant has been continually subject to suit, amenability to service of process is the controlling factor in the forum's selection of appropriate limitation laws. The forum is not restricted by the notion that a cause of action can "arise" at only one point in time and in only one place. Should defendant be subject to suit in more than one jurisdiction at the same time, or in a number of successive jurisdictions, the forum could apply the law of any such jurisdiction, provided defendant was amenable to suit for its full prescriptive period. Thus, emphasis is properly placed upon plaintiff's failure to take advantage of the opportunity to sue. However, such a statute has at least one serious defect: it does not eliminate the possibility of perpetual or unduly extended liability. If defendant has resided for nine years in each of three different states and the appropriate period of limitation is ten years in each state, the forum

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this state shall be the period fixed by the law of the place where the claim accrued, disregarding any provision which may operate to suspend, toll, interrupt or extend the running of that period."

200. Professor Vernon proposed such a statute and worded it in the following manner: "If a claim against a person who has been amendable [*sic*] to service of process in any jurisdiction within the United States for its entire statutory period of limitations is barred by the limitation laws of that jurisdiction, whether such bar is deemed remedial or substantive, it shall be barred in this state." *Statutes of Limitation in the Conflict of Laws: Borrowing Statutes*, 32 ROCKY MT. L. REV. 287, 328 (1960).

must apply its own limitation rules. Even though twenty-seven years have elapsed, plaintiff's action is not barred because defendant was not subject to suit in any one state for its entire statutory period. If defendant has *never* been a resident of the forum, the forum's period is suspended because of defendant's absence.

The many variables involved make it extremely difficult to draft borrowing legislation which will effectively compel reasonably prompt litigation in all cases. Perhaps the answer lies in a modification of the idea that plaintiff's action might be barred by the law of any jurisdiction in which defendant remained continually amenable to service of process. Since limitations operate to bar a cause of action because of plaintiff's failure to avail himself of judicial machinery within a reasonable time, consideration should be given to the plaintiff's opportunity to sue in an available forum. But, while proper weight should be given to defendant's amenability to service of process, any possibility of perpetual liability should be avoided. A statute worded as follows might accomplish both objectives:[201]

> No action shall be maintained in this state if barred by the limitation laws of the jurisdiction in which defendant resided when the claim against him first became subject to enforcement by judicial proceeding. Provided, however, that if the laws of such jurisdiction toll or suspend the running of its period of limitation due to the absence of defendant from that jurisdiction, action must be commenced in this state no later than five years after the time when the limitation period of such jurisdiction would have expired had defendant remained continually amenable to action in such jurisdiction.

Several effects of such a statute should be noted. First, the choice of appropriate limitations is properly based on defendant's amenability to suit. However, if defendant was a resident of several successive jurisdictions, the forum need look only to the law of the jurisdiction in which defendant resided when suit first became possible. Although it might be argued that the law of each successive jurisdiction should be considered, it is the law of the jurisdiction in which defendant resided when litigation initially became possible which first exposed

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201. The five year figure is not suggested as a magic number; a limitation of three years, ten years, etc., might be substituted. Regardless of defendant's lack of bad faith, his move from one state to another will cause plaintiff some unavoidable delay, and his absence from the jurisdiction whose law is borrowed obviously affects plaintiff's opportunity to sue in that jurisdiction. Thus, such tolling provisions should be borrowed along with the foreign period of limitation, but they should not operate to extend unduly the period of defendant's judicial liability. A maximum extension of five years would seem to give plaintiff ample opportunity to locate a perambulating defendant and institute suit.

plaintiff to the necessity of bringing timely suit. This initial jurisdiction, therefore, is the one having primary contact with the timeliness of plaintiff's suit, and application of its limitation rules would be proper. Second, once the forum has determined that the laws of a particular jurisdiction should be applied, all rules pertaining to limitations which would be applied by the courts of that jurisdiction should also be applied by the forum. This would include, but would not be limited to, statutory provisions which toll limitation periods while defendant is absent from the enacting state. However, the five-year proviso concerning such tolling provisions would operate to prevent the possibility of perpetual liability. If called upon to borrow a State *X* ten-year period, the forum would apply both the ten-year period and all appropriate State *X* tolling provisions. But in no event would defendant's absence for State *X* operate to subject him to suit in the forum after a total period of fifteen years has expired. Third, if defendant is a resident of the forum when suit against him first became possible, the suggested statute would not operate to "borrow" foreign law but would call for application of domestic rules. In such a case, the proviso concerning absent defendant tolling provisions would operate as a limitation on the forum's own tolling statute.[202] The policy behind such tolling provisions is justifiable; the plaintiff's action should not be barred by the limitation laws of a jurisdiction in which defendant has not remained continually amenable to service of process. However, a statute which provides for indefinite suspension does not induce timely litigation and often disregards the reasonableness of plaintiff's delay in bringing suit. If domestic limitations are extended for a maximum of five years, plaintiff is prompted to seek judicial enforcement within a reasonable time, although this might entail resort to the courts of a sister state. At the same time, the period within which he must sue is sufficiently extended to allow for inconvenience and delay incident to litigation in a foreign jurisdiction.[203]

The proposed statute, applicable to all causes of action regardless of whether they "arise" in the forum or elsewhere, calls for application of either foreign or domestic law and properly bases the choice on

202. In order to avoid possible confusion and to make it clear that defendant's absence from the forum will toll domestic limitations for a specific maximum period of time, it might be advisable to add the five year proviso to the forum's absent defendant tolling statute. CONN. GEN. STAT. REV. §52-590 (Supp. 1959) might be used as a model for this purpose.

203. Two other characteristics of the proposed statute might be noted. Under this statute plaintiff's residence in the forum is immaterial, thus eliminating discrimination in favor of local obligors. In making its choice of appropriate limitation laws the forum need not resolve where, or how many times, a cause of action "arises." It need only resolve the question of fact as to where defendant resided when he first became subject to court action.

defendant's amenability to suit when plaintiff's cause of action was first exposed to limitations. In addition, such a statute prevents undue extension of the period of defendant's judicial responsibility merely because he did not remain amenable to suit in a single jurisdiction for its full prescriptive period. On the other hand, reasonable additional time is allowed to compensate for delay caused by a defendant who moves from one state to another. Thus, suit must be brought within a reasonable time, even in those cases in which defendant does not repress his peregrinatory inclinations.

APPENDIX A

A Suggested Grouping of Borrowing Statutes According to Their Basic Requirements[1]

The statutes are presented in outline form according to their requirements.[2] Ten jurisdictions are excluded because of the absence of a borrowing statute of

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1. For other suggested classifications of borrowing statutes, see Proyect, *A Study of the Uniform Statute and the Present State of the Law Limiting Claims Arising in Foreign States*, 4 WAYNE L. REV. 123 (1958); Vernon, *Statutes of Limitation in the Conflict of Laws: Borrowing Statutes*, 32 ROCKY MT. L. REV. 287, 294-96 (1960). Both studies evolved from the 1957 promulgation of a "Uniform Statute of Limitations on Foreign Claims Act." HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 264 (1957).

2. Thirty-eight states, the Canal Zone, Guam, Puerto Rico, and the Virgin Islands have borrowing statutes of general application: ALA. CODE tit. 7, §37 (1960); ALASKA COMP. LAWS ANN. §55-2-23 (1949); ARIZ. REV. STAT. ANN. §12-506 (A) (1956); CAL. CIV. PROC. CODE §361; COLO. REV. STAT. ANN. §87-1-21 (1953); DEL. CODE ANN. tit. 10, §8120 (1953); FLA. STAT. §95.10 (1961); HAWAII REV. LAWS §241-8 (1955); IDAHO CODE ANN. §5-239 (1947); ILL. ANN. STAT. ch. 83, §21 (Smith-Hurd 1959); IND. ANN. STAT. §2-606 (Supp. 1959); IOWA CODE ANN. §614.7 (1946); KAN. GEN. STAT. ANN. §60-310 (1949); KY. REV. STAT. ANN. §413.320 (1955); LA. CIV. CODE ANN. art. 3532 (West 1952); ME. REV. STAT. ANN. ch. 112, §111 (1954); MASS. ANN. LAWS ch. 260, §9 (1956); MINN. STAT. ANN. §541.14 (1959); MISS. CODE ANN. §741 (1942); MO. ANN. STAT. §516.180 (1949); MONT. REV. CODES ANN. §93-2717 (1947); NEB. REV. STAT. §25-215 (1956); NEV. REV. STAT. §11.020 (1959); N.Y. CIV. PRAC. ACT §13; N.C. GEN. STAT. §1-21 (Supp. 1959); OHIO REV. CODE ANN. §2305.20 (Page 1954); OKLA. STAT. ANN. tit. 12, §99 (1951); ORE. REV. STAT. §12.260 (1961); PA. STAT. ANN. tit. 12, §39 (1953); R.I. GEN. LAWS ANN. §9-1-18 (1956); TENN. CODE ANN. §28-114 (1955); TEX. REV. CIV. STAT. ANN. art. 5542 (1958); UTAH CODE ANN. §78-12-45 (1953); VA. CODE ANN. §8-23 (1957); WASH. REV. CODE ANN. §4.16.290 (1961); W. VA. CODE ANN. §5409 (1955); WIS. STAT. ANN. §330.205 (Supp. 1961); WYO. STAT. ANN. §1-25 (1957); C.Z. CODE tit. 4, §111 (1934); GUAM CODE CIV. PROC. §361 (1953); P.R. LAWS ANN. tit. 32, §263 (1954); VIR. IS. CODE tit. 5, §41 (1957).

general application.[3] The District of Columbia,[4] New Jersey,[5] and Vermont[6] are omitted because their statutes are of limited application.

A. Where must the cause of action come from?
   1. It must *arise* in some jurisdiction other than the forum — Alaska, California, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Nevada, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Utah, Washington, Wyoming, Canal Zone, Guam, Puerto Rico, Virgin Islands.
   2. It must *accrue* in some jurisdiction other than the forum — Mississippi, Montana, Rhode Island, Tennessee.
   3. It must *originate* in some jurisdiction other than the forum — Missouri.
   4. It must be based on a contract made or an act done in another jurisdiction — Alabama.
   5. It must be based on a contract made and to be performed in another jurisdiction — Virginia, West Virginia.
   6. It must be based on injuries received in another jurisdiction — Wisconsin.
   7. No specific indication as to where the cause of action must have had its basic contacts — Arizona, Maine, Massachusetts, Nebraska, Texas.

With the exception of group 7, the cause of action must not have had its primary contact with the enacting jurisdiction. In regard to group 7, if reference is made only to the wording of the statutes involved, it may be argued that the borrowing provisions are applicable even though the cause of action had its primary contact with the enacting jurisdiction.

B. Requirements relating to the residence of the parties at the time the cause of action arose:
   1. Both plaintiff and defendant must have been non-residents — Alaska, Kansas, Louisiana, Maine, Montana, Oklahoma, Oregon, Washington, Virgin Islands.
   2. The only residence requirement mentioned relates to the citizenship or residence of *plaintiff*; no similar express requirement in regard to defendant —
      a. The borrowing statute is not applicable if plaintiff was a *citizen* of the enacting jurisdiction and held the cause of action since it was first recognized — California, Idaho, Minnesota, Nevada, Utah, Guam, Puerto Rico.
      b. The borrowing statute is not applicable if plaintiff was a *resident* of the enacting jurisdiction and held the cause of action since it was first recognized — Delaware, Hawaii, New York, North Carolina, Canal Zone.
      c. Plaintiff must have been a resident of the foreign jurisdiction to which reference is made and must have resided there for the full statutory period of limitation — Massachusetts, Rhode Island.
      d. Plaintiff must have been a resident of the foreign jurisdiction in which he received the personal injuries upon which his action is based — Wisconsin.

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3. Arkansas, Connecticut, Georgia, Maryland, Michigan, New Hampshire, New Mexico, North Dakota, South Carolina, South Dakota.

4. The District of Columbia statute is applicable only in regard to enforcement of foreign judgments. D.C. CODE ANN. §12-203 (1961).

5. The New Jersey borrowing statute is applicable only in regard to enforcement of foreign judgments. N.J. STAT. ANN. §2A:14-5 (1952).

6. The Vermont statute deals only with the narrow subject of the liability of stockholders and foreign corporations. VT. STAT. ANN. tit. 12, §510 (1959).

3. The only residence requirement mentioned relates to the residence of *defendant*; no similar express requirement in regard to plaintiff—
   a. Defendant must have been a non-resident of the forum — Arizona, Indiana, Iowa, Nebraska, Tennessee, Texas.
   b. Defendant must have been a resident of the foreign jurisdiction in which the contract was made or act done — Alabama.
   c. Defendant must have been a resident of a foreign jurisdiction, but only if that jurisdiction is one other than that in which the cause of action accrued — Mississippi.
   d. Defendant must have been a resident of the foreign jurisdiction in which the contract was made and was to be performed — Virginia, West Virginia.
4. The statute contains no express requirement relating to the residence of either plaintiff or defendant — Colorado, Florida, Illinois, Kentucky, Missouri, Ohio, Pennsylvania, Wyoming.

C. Assuming that the borrowing statute is applicable, what law will be applied to determine whether plaintiff's cause of action is barred in the forum?
1. Statutes requiring application of the statute of limitations of some foreign jurisdiction in which one or both of the parties resided. The applicable law is that of the jurisdiction in which
   a. *all* of the parties have resided — Maine,
   b. plaintiff has resided — Massachusetts,
   c. defendant has resided; these statutes may be classified according to those that apply the law of the jurisdiction
      (1) from which defendant has migrated — Arizona, Texas,
      (2) in which defendant has "previously" resided — Iowa,
      (3) in which defendant has resided — Montana.
2. Statutes requiring application of some foreign law, but which make no express reference to the residence of either of the parties. The applicable law is that of the jurisdiction in which
   a. the cause of action arose — Alaska, California, Colorado, Florida, Hawaii, Idaho, Illinois, Kansas, Minnesota, Nevada, North Carolina, Oklahoma, Oregon, Pennsylvania, Utah, Washington, Wyoming, Canal Zone, Guam, Puerto Rico, Virgin Islands; but if the forum's period of limitation is shorter, it is to be applied — Delaware, New York, Ohio,
   b. the cause of action *accrued*, but if the forum's period of limitation is shorter, it is to be applied — Kentucky,
   c. the cause of action *originated* — Missouri,
   d. the "contract or obligation is to be performed" — Louisiana,
   e. the plaintiff received the personal injuries for which he brings the present action — Wisconsin.
3. Statutes combining the factors mentioned in 1 and 2 above. The applicable law is that of the jurisdiction in which
   a. the cause of action *arose and* defendant resided — Indiana, Rhode Island,
   b. the cause of action *accrued and* defendant resided — Tennessee,
   c. the cause of action *accrued, or* in which defendant has *previously* resided — Mississippi,
   d. the contract was made or act done, provided that defendant must have been a resident of that jurisdiction — Alabama,
   e. defendant resided and the contract was made and to be performed, *or* the law of the forum — Virginia, West Virginia.
4. The Nebraska statute calls for application of the laws of *any* other juris-

diction, but only if the action would have been barred had defendant been a resident of Nebraska and its own period of limitation applied.

In addition to these basic requirements, several miscellaneous factors should be mentioned. (1) In all but seven of the jurisdictions under consideration,[7] the borrowing statute expressly applies to a cause of action arising in a foreign county; in these seven jurisdictions the same applicability would seem to result by implication. (2) In four states, the borrowing statute is not applicable unless defendant is a resident of the forum at the time action is commenced.[8] (3) A borrowing statute which is general in its scope is apparently applied when plaintiff seeks enforcement of a foreign judgment;[9] however, statutes in eight states specifically borrow foreign limitation laws for this purpose.[10] (4) Six jurisdictions have enacted provisions attempting to establish a maximum period of time during which a foreign cause of action may be enforced.[11] (5) Two separate and distinct phrases have been written into a limited number of borrowing statutes and have given the courts unwarranted difficulty: *fully barred*, found in four statutes,[12] and *like causes of action*, found in three.[13]

APPENDIX B

A Suggested Classification Based upon Related Groups of Borrowing Statutes Having Identical or Similar Provisions

Because of the multifarious nature of borrowing legislation, it is impossible to select a small sampling which accurately illustrates a significantly large number of statutes containing identical or internally consistent provisions. However, there are a few small groups of statutes which have combined basic requirements in such a way that they are internally consistent.

Group 1 may be illustrated by the California statute:[14]

> "When a cause of action has *arisen* in another state, or in a foreign country, and *by the laws thereof* an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, *except* in favor of one who has been a *citizen* of this state, and who has held the cause of action from the time it accrued."

This is the largest single group of internally consistent statutes; similar provisions are found in almost identical terms in six other jurisdictions.[15]

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7. Indiana, Louisiana, Minnesota, Montana, New York, North Carolina, Texas.
8. Arizona, Louisiana, Mississippi, Texas.
9. See Bemis v. Stanley, 93 Ill. 230 (1879); Chaloupka v. Martin, 179 Iowa 1173, 162 N.W. 567 (1917); Chevrier v. Robert, 6 Mont. 319, 12 Pac. 702 (1887); Shannon v. Shannon, 193 Ore. 575, 238 P.2d 744 (1952).
10. Ariz. Rev. Stat. Ann. §12-549 (1956); D.C. Code Ann. §12-203 (1961); Ky. Rev. Stat. Ann. §413.330 (1955); La. Civ. Code Ann. art. 3532 (West 1952); N.J. Stat. Ann. §2A:14-5 (1952); Tex. Rev. Civ. Stat. Ann. art. 5530 (1958); Va. Code Ann. §8-22 (1957); W. Va. Code Ann. §5405 (1955).
11. Ariz. Rev. Stat. Ann. §12-507 (1956); Colo. Rev. Stat. Ann. §87-1-22 (1953); Conn. Gen. Stat. Rev. §52-590 (Supp. 1959); Hawaii Rev. Laws §241-6 (1955); Tex. Rev. Civ. Stat. Ann. art. 5543 (1958); Wyo. Stat. Ann. §1-16 (1957).
12. Indiana, Iowa, Missouri, Pennsylvania.
13. Delaware, Kentucky, Ohio.
14. Cal. Civ. Proc. Code §361. (Emphasis added.)
15. Idaho, Minnesota, Nevada, Utah, Guam, Puerto Rico.

Group 2 may be illustrated by the borrowing statute enacted in the Canal Zone:[16]

> "When a cause of action has *arisen* in a State of the United States, or in a foreign country, and *by the laws thereof* an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in the Canal Zone, *except* in favor of one who has been a *resident* of the Zone, and who has held the cause of action from the time it accrued."

Statutes containing identical provisions may be found in two other jurisdictions.[17] The only difference between this group and group 1 is the requirement based on the residence of plaintiff rather than his citizenship.

Group 3 may be illustrated by section 13 of the New York Civil Practice Act:

> "Where a cause of action *arises* outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws *either* of this state or of the state or country where the cause of action arose, for bringing an action upon the cause of action, *except* that where the cause of action originally accrued in favor of a *resident* of this state, the time limited by the laws of this state shall apply . . . ." (Emphasis added.)

Delaware has a statute containing identical provisions.[18]

These three groups all require that the cause of action *arise* in another state and contain an exception in favor of domestic citizens or residents. Only group 3, however, expressly provides that the forum's period of limitation is to be applied if it is shorter.

Group 4 consists of five states[19] and the Virgin Islands and may be illustrated by the Oregon statute:[20]

> "When the cause of action has *arisen* in another state, territory or country, *between nonresidents* of this state, and by the laws of the state, territory or country where the cause of action arose, an action cannot be maintained thereon by reason of the lapse of time, no action shall be maintained thereon in this state."

Two features distinguish this group from the first three: The statute is expressly applicable only if the parties were non-residents when the cause of action arose, and no exception is made in favor of a citizen or resident plaintiff.

Group 5 also consists of five states,[21] and the Illinois legislation is typical:[22]

> "When a cause of action has *arisen* in a state or territory out of this state, or in a foreign country, and, by the laws thereof, an action thereon cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in this state."

This species of borrowing statute is identical with those found in the first two

16. C.Z. CODE tit. 4, §111 (1934). (Emphasis added.)
17. Hawaii, North Carolina.
18. DEL. CODE ANN. tit. 10, §8120 (1953).
19. Alaska, Kansas, Oklahoma, Oregon, Washington.
20. ORE. REV. STAT. §12.260 (1961). (Emphasis added.)
21. Colorado, Florida, Illinois, Pennsylvania, Wyoming.
22. ILL. ANN. STAT. ch. 83, §21 (Smith-Hurd 1959). (Emphasis added.)

groups, but with no exception in favor of a resident or citizen plaintiff. Note that the statutes in this group do not contain an express requirement that the forum's statute of limitations is applicable if shorter, nor do they specifically require non-residence at the time the cause of action arose.

Group 6, composed of two states,[23] may be illustrated by the Ohio statute:[24]

> "If the laws of any state or country where a cause of action *arose* limit the time for the commencement of the action to a *lesser number of years* than do the statutes of this state in *like causes of action* then said cause of action shall be barred in this state at the expiration of said lesser number of years."

Except for the absence of an exception in favor of the plaintiff, the two statutes in this group most closely resemble those of New York and Delaware, mentioned in group 3. However, because of the phrase *like causes of action*, these statutes must be placed in a separate category.

Group 7 consists of Virginia and West Virginia; the statute of either may be cited, since they have a common source:[25]

> "Upon a contract which was made and was to be performed in another state or country by a person who then resided therein, no action shall be maintain after the right of action thereon is barred either by the laws of such state or country or [by the laws] of this State."

Though the statutes in this group and those in group 8 have characteristics in common with the other borrowing statutes, each of these two groups forms its own island, and a comparison with other borrowing statutes would be of little practical value.

Group 8 is comprised of Arizona and Texas. Both statutes are substantially the same, and the Texas legislation is illustrative:[26]

> "No action shall be brought against an immigrant to recover a claim which was barred by the law of limitation of the State or country from which he emigrated . . . ."

Although forty-two jurisdictions have borrowing statutes of general application, only twenty-nine are represented in these groupings; the remaining statutes fall within individual pigeonholes. Since they are all represented in the more comprehensive classification based on essential requirements, it would serve no practical purpose merely to list them.

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23. Kentucky, Ohio.
24. OHIO REV. CODE ANN. §2305.20 (Page 1954). (Emphasis added.)
25. VA. CODE ANN. §8-23 (1950).
26. TEX. REV. CIV. STAT. ANN. art. 5542 (1958).